



# FASPE

FELLOWSHIPS AT  
AUSCHWITZ  
FOR THE STUDY OF  
PROFESSIONAL ETHICS

2016  
JOURNAL

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With special thanks to

Dr. Jeffrey Botkin, Dr. Mary Gentile, Dr. Sarah Goldkind, Professor Ari Goldman, Professor Lonnie Isabel, Professor Judith Lichtenberg, Professor David Luban, Rabbi James Ponet, Professor Markus Scholz, and Professor Kevin Spicer.



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**EDITOR**

Thorin R. Tritter, Ph.D.

**MANAGING EDITOR**

Talia Bloch

**DESIGN & LAYOUT**

Trevor Messersmith

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# TABLE OF CONTENTS

Welcome to the 2016 FASPE Journal.....1

C. DAVID GOLDMAN, CHAIRMAN, FASPE

FASPE Overview.....3

Introduction to Selected Business Papers.....5

THORIN TRITTER, EXECUTIVE DIRECTOR, FASPE

The Ethics of the Minimum Wage.....7

SIMON BASSEYN, UNIVERSITY OF PENNSYLVANIA, WHARTON SCHOOL, CLASS OF 2017

The Ethical Implications of Offshore Outsourcing.....14

MAX S. BLACHMAN, EMORY UNIVERSITY, GOIZUETA BUSINESS SCHOOL, CLASS OF 2017

Only 2 Degrees: Banks and Climate Change.....21

KORA KRAUSE, EUROPEAN SCHOOL OF MANAGEMENT AND TECHNOLOGY (ESMT), MBA 2013

Introduction to Selected Journalism Papers.....31

THORIN TRITTER, EXECUTIVE DIRECTOR, FASPE

When a Reporter Has to Make the “Death Knock” .....33

KATRINA CLARKE, FREELANCE REPORTER, TORONTO

Whose Truth Are We Telling?.....41

ILGIN YORULMAZ, COLUMBIA UNIVERSITY GRADUATE SCHOOL OF JOURNALISM,  
CLASS OF 2016

Deciding When Intervention May Ruin the Story.....49

DAYTON MARTINDALE, UC BERKELEY GRADUATE SCHOOL OF JOURNALISM, CLASS OF 2017

Introduction to Selected Law Papers.....57

THORIN TRITTER, EXECUTIVE DIRECTOR, FASPE

A Reflection on Two FASPE Epiphanies.....59

ELIZABETH J. JONAS, GEORGETOWN UNIVERSITY LAW CENTER, CLASS OF 2016

Exploring the Justice Trial of the Nuremberg Trials.....65

CATHERINE SMITH, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW, CLASS OF 2017

Was the Peter Thiel Funded Lawsuit Against Gawker Ethical?.....72

JACK HUERTER, UNIVERSITY OF WISCONSIN LAW SCHOOL, CLASS OF 2017

# TABLE OF CONTENTS

## Introduction to Selected Medical Papers.....81

THORIN TRITTER, EXECUTIVE DIRECTOR, FASPE

### A Procedure Resides in Its Ethics: Behavior in the Operating Room.....83

JASON HAN, UNIVERSITY OF PENNSYLVANIA, PERELMAN SCHOOL OF MEDICINE,  
CLASS OF 2017

### Patient Care Above All Else: Reexamining Residency Duty-Hour Guidelines.....90

PRISCILLA WANG, YALE SCHOOL OF MEDICINE, CLASS OF 2017

### Assessing Quality of Life for a Suicidal Patient.....100

BEN YU, UNIVERSITY OF PENNSYLVANIA, PERELMAN SCHOOL OF MEDICINE,  
CLASS OF 2017

## Introduction to Selected Seminary Papers..... 105

THORIN TRITTER, EXECUTIVE DIRECTOR, FASPE

### Attempted Erasure: A Sermon.....107

DANIEL HEADRICK, BAYLOR UNIVERSITY, GEORGE W. TRUETT THEOLOGICAL  
SEMINARY, CLASS OF 2017

### Therefore, Go: Reflections on FASPE, Injustice, and Ministry in Uncertain Times.....113

JUSTIN MIKULENCAK, YALE DIVINITY SCHOOL, CLASS OF 2017

### Praising God on the Train Tracks..... 119

MISHA SHULMAN, INDEPENDENT RABBINICAL STUDENT, ORDINATION 2018

## Introduction to Selected Alumni Papers.....125

THORIN TRITTER, EXECUTIVE DIRECTOR, FASPE

### “You Showed Us What Hope Looked Like”.....127

KRISTEN BELL, FASPE LAW FELLOW 2013

### At Standing Rock and Beyond, What Is to Be Done?..... 131

ERIC MARTIN, FASPE SEMINARY FELLOW 2015



# INTRODUCTION & OVERVIEW



# Welcome to the 2016 FASPE Journal

BY DAVID GOLDMAN

CHAIRMAN, FASPE

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The world has survived 2016. Yes, we live in interesting and challenging times. Artificial Intelligence, post-facts (the Oxford English Dictionary's word of the year!), questions about freedoms of press and religion. FASPE's mission, with its focus on ethical behavior, becomes ever more important.

You will see in the following pages a representative sample of work produced by the 2016 Fellows during the course of their fellowships. The FASPE fellowships, and the connections that the Fellows make with each other and with FASPE, do not end with the Fellows' return to their schools and to their places of work. In recognition of this continuity, we have also included in the Journal pieces written by two of our more distant alumni.

FASPE challenges its fellows and alumni to reflect and to think — about themselves, about their professions, about their responsibilities as leaders. The one common thematic thread shared by all of the papers published here is that they confront *ethical* issues within the professions.

Ethical challenges are not linear, they are not predictable and they are not fundamentally political. Issues can arise in an operating room, in a C-Suite, in a partner's office in a law firm, in the mind of a blogger or in a clergyperson's office. They can also arise because of the actions of a legislature, decisions made in a courthouse or as a result of the policy proposals of a mayor, governor, president or prime minister.

Our fellows and alumni are tasked with identifying ethical failures and ethical risks within the professions, however and wherever they may arise. We also seek to offer tactical suggestions as to how to act after having identified an issue. For instance, we have a session in the Law program on how to handle a situation in which a senior partner asks a young associate to act in a manner that appears inappropriate (the answer is *not* to lecture the senior partner). Moreover, FASPE intends to speak out on these matters where they have broader implications.

The issues that we face today are, of course, different from those that existed in Germany during the Nazi era. However, the influence, and therefore the responsibilities, of professionals are no less impactful.

We hope that the following pages pique your interest and demonstrate the ethical foundations that FASPE Fellows are building. On behalf of FASPE, I congratulate the 2016 class of FASPE Fellows. We look forward to their leadership in their communities — small and large.

# FASPE Overview

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FASPE operates fellowship programs for graduate students in professional schools — business, journalism, law, medical, and seminary — and early stage practitioners in those professions. The fellowships are comprised of intense two-week study trips in Germany and Poland where fellows study the actions and choices of their professional counterparts in Germany between 1933 and 1945.

Through this examination of the ethical failures of the professions in what was a progressive, modern society, fellows learn about the critical role that professionals play in society and the consequences of their actions — positive or negative — on the world around them. FASPE challenges its fellows to become acutely aware of their responsibilities as respected professionals in their communities and to act in an ethical fashion.

FASPE offers a contemporary approach to the study of the Holocaust by focusing on the actions of perpetrators rather than on victims. Drawing on the powers of place, the study of history, and a rich contextual education, FASPE creates a uniquely effective means for studying professional ethics — well beyond what is achieved by the rules-based approach often seen in the traditional university classroom.

Originally piloted in 2009 and launched in 2010, FASPE marked its seventh year of operation in 2016 and now has nearly 400 alumni. As a highly competitive program, FASPE accepts only 65 fellows (12 - 14 in each of the five professions) from nearly 1,000 applications per year. Its faculty is drawn from international Holocaust historians, practicing professionals, and leading academics. Fellowships are granted to students and recent graduates from professional schools throughout the United States and internationally.

FASPE seminars engage fellows in thinking across several themes that span the five disciplines, including: defining professionalism; considering a professional's responsibility to the larger society; and the tactics of enacting an ethical decision. Seminars also focus on topics that are discipline specific, such as:

- **Business:** Are there products that simply should not be sold to particular consumers? What are the responsibilities of the C-Suite, or of the corporation, beyond formalistic legal compliance? What are appropriate penalties for corporate wrongdoing?

- **Journalism:** How do journalists balance the costs and benefits of access? What ethical issues arise in political reporting? What challenges arise in fact-checking a victim's story? Does advocacy fit into journalism?
- **Law:** How do attorneys manage duties of candor and confidentiality? What control do lawyers have over decisions that impact a client? Does the duty to a client supersede all other responsibilities?
- **Medical:** What are the ethical issues involved in medical research on human subjects? Should physicians participate in assisted suicide? How should doctors deal with resource limitations in making healthcare decisions?
- **Seminary:** What is the role of religious leaders as ethical, and not just religious, educators? When and how should they address political issues with a congregation? What are the challenges of pastoral care during times of crisis?

FASPE has far-reaching goals. On an individual basis, it seeks to instill participants with a sense of personal responsibility for the ethical and moral choices they make. By extension, it also seeks to have an impact on these professions, improving the practices of all business executives, clergy, doctors, journalists, and lawyers.



# BUSINESS PAPERS



# Introduction to Selected Business Papers

BY THORIN TRITTER

EXECUTIVE DIRECTOR, FASPE

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The 2016 Business cohort included eight MBA students, four recent MBA graduates, and one student working on a Masters of Management, Organization Studies, and Cultural Theory. Although they came from varied backgrounds and had a range of career interests, this wonderful group of Fellows quickly found common ground, established trust, and created a seminar space that was both light-hearted and encouraged serious debate.

Leading this group in discussions — in seminar rooms, on buses, and over meals — were two warm and deeply thoughtful faculty members who developed the initial FASPE Business curriculum in 2015 and refined it for 2016: Mary Gentile, Creator and Director of Giving Voice to Values and a Professor of Practice at the University of Virginia's Darden School of Business; and Markus Scholz, who holds the Endowed Chair of Corporate Governance and Business Ethics at FH Wien University of Applied Sciences in Vienna.

For two weeks this group traveled together, struggling to confront a painful past and to draw lessons for their own career futures. After the program, all of the FASPE Business Fellows wrote short papers that explored a contemporary issue in business ethics. The three that follow are examples of these papers and offer a sense of the lessons Business Fellows draw from the FASPE trip.

The first paper is by Simon Basseyn who takes as a starting point the 2015 decision by the Founder and CEO of Gravity Payments to raise the minimum salary of all his employees to \$70,000. Basseyn expands from there to systematically review the ethical concerns of a minimum wage as well as the practical business decisions that go into wage-setting by managers.

The second piece, by Max Blachman, looks at a different topic that has been in the news recently, focusing on the ethical implications of outsourcing information technology (IT) jobs to offshore locations. In an exploration that weaves together case examples, philosophy, and moral reasoning, Blachman concludes that no simple assessment is possible, arguing that offshore outsourcing may be unethical in some situations, but ethical in others.

The final paper included here is written by Kora Krause, who reaches out more broadly to look at the role of business in affecting climate change. Drawing on her own work experience — both in banking and at an NGO focused on climate change — she explores the importance of the banking industry in climate discussions and the challenges faced by executives at large banks. Pointing to the weakness of existing corporate social responsibility (CSR) programs, Krause concludes with a call for a C-suite led reconceptualization of these programs as a shared value that could be incorporated into profit and loss statements.

I thank these three authors and the other FASPE Business Fellows for their participation during the program, their search to understand the actions of business leaders in Nazi Europe, and their questioning of the tendencies and temptations of the profession they have chosen as their own.

# The Ethics of the Minimum Wage

BY SIMON BASSEYN

UNIVERSITY OF PENNSYLVANIA WHARTON SCHOOL, CLASS OF 2017

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## Introduction

In April 2015, Dan Price, Founder and CEO of Gravity Payments, a small credit card processing company in Seattle, raised the minimum wage for his employees to \$70,000. To do so, he cut his salary from over \$1 million and used nearly 80% of annual profits on labor.<sup>1</sup> In subsequent months, Mr. Price sold all his stocks, emptied his retirement accounts, and mortgaged two properties. In a made-for-Hollywood story, the decision caused a firestorm of attention while Price has become both a celebrity and a polarizing figure. Some have cast him as a hero and a symbol of corporate benevolence while others have castigated him, arguing that the decision was a PR stunt at best and a response to his brother's lawsuit (Price's brother, a minority shareholder, argued that Price was paying himself an excessive amount.) at worst. Some have pointed to the bump in employee retention, customer acquisition, and revenue growth as signs of the economic rationale for the decision while others have pointed to the departure of key employees and falling revenues and profits in recent months as signs of the inevitable negative economic consequences.<sup>2</sup> Underlying the amount of attention Dan Price's story has received is a growing nationwide debate on the minimum wage. Over the last two years, the "\$15 minimum wage" has become a hot-button topic, sparking controversy across the country. Cities, such as Los Angeles, San Francisco, and Seattle, have chosen to implement that minimum wage. Other cities and states, such as Baltimore, Minneapolis, California, New

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<sup>1</sup> Patricia Cohen, "One Company's New Minimum Wage: \$70,000 a Year," *The New York Times*, April 23, 2015, [http://www.nytimes.com/2015/04/14/business/owner-of-gravity-payments-a-credit-card-processor-is-setting-a-new-minimum-wage-70000-a-year.html?\\_r=1](http://www.nytimes.com/2015/04/14/business/owner-of-gravity-payments-a-credit-card-processor-is-setting-a-new-minimum-wage-70000-a-year.html?_r=1).

<sup>2</sup> For various perspectives, see: Dan Price, "Gravity Payments CEO Dan Price Reflects on \$70k Minimum Salary Experiment and Its Aftermath," *Today*, December 30, 2015, <http://www.today.com/series/2015-voices/gravity-payments-ceo-dan-price-reflects-70k-minimum-salary-experiment-t64401>; Paul Keegan, "Here's What Really Happened at That Company That Set a \$70,000 Minimum Wage," *Inc.*, November 2015, <http://www.inc.com/magazine/201511/paul-keegan/does-more-pay-mean-more-growth.html>; Christine Wang, "\$70k CEO: I Wasn't Ready for the Surge of Attention," *CNBC*, April 28, 2016, <http://www.cnn.com/2016/04/15/70k-ceo-i-wasnt-ready-for-the-surge-of-attention.html>; Jake Novak, "Business is Business, Charity is Charity," *CNBC*, August 3, 2015, <http://www.cnn.com/2015/08/03/mixing-business-with-charity-is-folly.html>; Paul Davidson, "Does a \$70,000 Minimum Wage Work?" *USA Today*, May 26, 2016, <http://www.usatoday.com/story/money/2016/05/26/does-70000-minimum-wage-work/84913242>; and Karen Weise, "The CEO Paying Everyone \$70,000 Salaries Has Something to Hide," *Bloomberg*, December 1, 2015, <http://www.bloomberg.com/features/2015-gravity-ceo-dan-price>.

York State, and many more, are still engaged in heated debates over whether to do so.<sup>3</sup> The issue made it to the national stage when former presidential candidate Bernie Sanders made a federal \$15 minimum wage part of his platform and when it was then adopted as part of the official Democratic Party platform at the Democratic National Convention.<sup>4</sup>

Much of the discourse on the topic has focused on the mixed empirical data surrounding the economic impact of a minimum wage on the economy, businesses, and employees. The limited ethical and moral conversations regarding the issue often address a vague claim of “treating people right.” While the question of a minimum wage is not a new one, the renewed contemporary emphasis on what is the *right* minimum wage — or whether we should even have one at all — calls for a more rigorous evaluation of the ethical and moral issues involved. This paper will systematically review the ethical concerns (as well as the economic effects where appropriate) surrounding the minimum wage as well as the practical business decisions that go into wage-setting by a manager.

## Ethical Issues and Perspectives

### Consequentialism

Much of the public conversation regarding the minimum wage takes its cues from consequentialist philosophy: the notion that the merits of the minimum wage should be weighed against its economic consequences. That is, if the minimum wage leads to overall beneficial economic results, it should be supported, and if not, it shouldn't. As a result, all the research and views on what the minimum wage does to the welfare of the poorest, to unemployment rates, and to the general economic well-being of the community in question, intentionally or unintentionally, adopt a consequentialist framework. Consequentialism itself, however, has multiple forms, notably utilitarianism and prioritarianism: the first being the belief that the utility of the most people should be maximized and the second being the belief that the utility of the worst off should be maximized first. On the issue of the minimum wage, these two different perspectives converge and reach the same conclusion: given the diminishing marginal utility of income, those with the lowest wages gain the most utility from an additional dollar, whereas those

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<sup>3</sup> See Irene Tung, Paul Sonn, and Yannet Lathrop, “The Growing Movement for \$1,” *National Employment Law Project*, November 2015. <http://www.nelp.org/content/uploads/Growing-Movement-for-15-Dollars.pdf>; Noam Scheiber, “What a \$15 Minimum Wage Would Mean for Your City,” *The New York Times*, August 12, 2015, <http://www.nytimes.com/2015/08/13/upshot/what-a-15-minimum-wage-would-mean-for-your-city.html>; Andrew Dunn, “Baltimore City Council Panel Approves \$15 Minimum Wage Bill,” *Baltimore Sun*, July 28, 2016, <http://www.baltimoresun.com/news/maryland/baltimore-city/politics/bs-md-ci-minimum-wage-vote-20160727-story.html>; and Tyler Gieseke, “City Attorney Says Minneapolis Voters Can't Set \$15 Minimum Wage,” *Minneapolis/St. Paul Business Journal*, July 28, 2016, <http://www.bizjournals.com/twincities/news/2016/07/28/minneapolis-15-minimum-wage-vote-city-attorney.html>.

<sup>4</sup> Bernie Sanders 2016 Platform: A Living Wage, <https://berniesanders.com/issues/a-living-wage/>; and 2016 Democratic Party Platform, July 21 2016, <https://www.demconvention.com/wp-content/uploads/2016/07/Democratic-Party-Platform-7.21.16-no-lines.pdf>.



with the highest wages gain the least. The consequentialist perspective on the minimum wage has been rigorously evaluated in the literature.<sup>5</sup> The unsurprising conclusion of work that argues that “the minimum wage should be evaluated using a consequentialist criterion that gives priority to the jobs and incomes of the worst off” (prioritarianism, though utilitarianism would reach a similar conclusion, as noted above) is that it “does not reach a single final judgment on the minimum wage.”<sup>6</sup> This is because the consequentialist argument relies on the economic effects of the minimum wage, but the true effects are unknown given conflicting evidence in the economic literature.<sup>7</sup> In general, the two major views summarizing the evidence are that the minimum wage either harms jobs and incomes of the worst off or that it does not do much harm or good. Thus, the criterion set forth by the consequentialist argument leads to the inevitable conclusion that “at worst, the minimum wage is a mistake and at best, it is something to be half-hearted about.”<sup>8</sup>

Interestingly, another philosophical perspective, namely John Rawls’ theory of justice highlighted by the “veil of ignorance,” reaches a similar conclusion. The veil of ignorance is a hypothetical cognitive experiment in which the participants are asked to make moral decisions for a society as a whole without knowing what their own abilities, talents, and social class would be within the context of that society. Given the possibility that an individual could be of the lowest class or talent level, participants tend to make ethical decisions which would maximize the well-being of the worst-off, since, hypothetically, it could have been them.<sup>9</sup> For the minimum wage, an extension of this theory of justice may consider those who would have the lowest wages as the worst-off in society. Therefore, the moral conclusions reached regarding the minimum wage would be similar to those of the consequentialist: given the lack of agreement on the economic effects of the minimum wage on the worst-off, the ethics are not clear, but at worst, it is best not to support a minimum wage, and at best, the support should be half-hearted. Therefore, those who subscribe to Rawlsian or consequentialist philosophy “should be inclined to look elsewhere for measures to deal with unemployment, poverty, and maldistribution [i.e. the problems of the worst-off].”<sup>10</sup> These conclusions, however, are often affected by one’s views on the economic effects of the minimum wage. As an example, some argue that by increasing the wages of the worst off — those with the highest marginal propensity to consume (how much an individual would consume given an extra dollar in income) — the marginal propensity to consume for society as a whole would increase. This then increases demand for products and services overall, which increases employers’ demand for labor/jobs, all of which together stimulate the broader economy.<sup>11</sup> If this, or any other

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<sup>5</sup> Tim Wilkinson, “The Ethics and Economics of the Minimum Wage,” *Economics and Philosophy* 2 (2004): 351-374.

<sup>6</sup> Wilkinson, 351-374.

<sup>7</sup> David Neumark, “The Effects of the Minimum Wages on Employment,” *Federal Reserve Bank of San Francisco: Economic Letter* (December 21, 2015): 37.

<sup>8</sup> Neumark, 37.

<sup>9</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 2005).

<sup>10</sup> Wilkinson, 351-374.

<sup>11</sup> May Leung, “The Ethics of Minimum Wage Legislation,” *Seven Pillars Institute*, March 30, 2015, <http://sevenpillarsinstitute.org/case-studies/the-ethics-of-minimum-wage-legislation>.

overwhelmingly positive effects of the minimum wage, were to bear out convincingly in data, consequentialist and Rawlsian philosophies would then reach a different conclusion from the one outlined above.

## Kantian Deontology

The converse of utilitarianism — that the means can justify the ends — is Kantian deontology, which argues that actions cannot be determined by their consequences, but rather that they must be judged according to their inherent morality. For our purposes, one key feature of this philosophy is that one “may not treat humanity ... as a means to an end but always at the same time as an end.” This is to say that actions cannot “instrumentalize” or make use of humans as a means for some other end. Accordingly, some may argue that extremely low wages merely make use of a person’s labor instead of treating him or her with the dignity that each individual inherently possesses, thus violating the deontological measuring stick of morality.<sup>12</sup> It is irrelevant if the consequences to society overall or to the worst-off of low wages are positive or negative. Such wages are themselves immoral.

This tension between utilitarianism and deontology was a recurrent theme in our discussions as part of the FASPE program. For example, an ethical dilemma related to the minimum wage is that of the treatment of workers, highlighted in recent years by tragedies in manufacturing facilities in Asia, such as the collapse of Rana Plaza in Dhaka, Bangladesh.<sup>13</sup> Is the employment of low-wage workers under poor working conditions justified by the provision of opportunity for the workers in areas where such work is the best option, or does inexpensive labor at the expense of these workers’ dignity constitute an immoral instrumentalization of humans in order to produce cheaper products? The conclusion can differ radically depending on whether one uses a consequentialist or deontological philosophical framework. In perhaps the most extreme example in history, Nazi ethics were considered moral by many at the time — the extermination of Jews, after all, was claimed to be for the greater good of society. Such a bastardization of morality lends support to the criticism that basically anything can be justified using a consequentialist perspective. Such a philosophy, therefore, requires significant caution whenever applied, including to the issue of the minimum wage.

## Non-exploitation

While consequentialism and deontology are the two key ethical frameworks used in the minimum wage debate, there are several other relevant ethical principles that are worthy of discussion. One that is closely related to Kantian deontology is that of the moral imperative against exploiting people. This view holds that if employers hire workers, the

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<sup>12</sup> Ali Shakil, “Kantian Duty-Based (deontological) Ethics,” *Seven Pillars Institute*, <http://sevenpillarsinstitute.org/morality-101/kantian-duty-based-deontological-ethics>.

<sup>13</sup> John A. Quelch and Margaret L. Rodrigues, “Rana Plaza: Bangladesh Garment Tragedy,” *Harvard Business School Business Case N2-514-034*, October 31, 2013.

workers are being exploited unless they are paid a “living wage.” While this may be a reasonable argument on its surface, the reality is that minimum wage laws target individuals with low wages, not those with low incomes. These two, unfortunately for minimum wage laws, are only weakly correlated. For example, 46% of poor workers make more than \$10.10 per hour while 36% have wages over \$12 per hour, where poor workers are defined as those with overall low family incomes. These individuals tend to be poor not because of low wages but because they work fewer hours, either by choice or necessity. Therefore, much of the benefit from raising the minimum wage would not go to poor families. Unsurprisingly, therefore, research has shown that the minimum wage is an ineffective tool at reducing poverty. If the moral argument for the minimum wage were based on reducing exploitation, it would be an insufficient basis because many of those who work for a minimum wage do not actually live in poverty (as defined by federal poverty levels) and are unlikely to be described as “exploited.”<sup>14</sup>

### Freedom (to contract)

One of the frequently cited counter-arguments to having a minimum wage is the idea of the “freedom to contract” work under any desired terms. While it is technically true that under minimum wage laws, it is illegal for workers and employers to contract for a wage below that set by law, workers do not lose anything more than the economic inputs into the consequentialist equation. In other words, the key benefit for workers in contracting for work is to obtain a job and to receive a wage for that job. If the minimum wage were to decrease a worker’s ability to obtain a job or receive a wage, then the main loss to the worker would be that economic loss, not the loss of the freedom to contract. The principle of freedom to contract, it has been argued, does not have any inherent value above and beyond the economic value that it brings and should not be valued on its own.<sup>15</sup>

### Economic Justice: “The Living Wage”

This argument is the refrain most commonly heard in the media and at political events today — that is, individuals who work should be paid a “living wage,” whatever that may be. Further, the argument goes, there should not be as dramatic a difference in pay between managers and entry level employees as there is today, particularly when entry level employees struggle to make ends meet. Unfortunately, as discussed above, the minimum wage does a poor job of targeting individuals in families that are actually living in poverty, a task much better accomplished by policies like the earned income tax credit, which specifically targets families and individuals who have low incomes, not just low wages.<sup>16</sup> While the data don’t support the minimum wage as an efficient and effective policy to tackle poverty, the “living wage” remains a commonly described ethical principle relevant to the minimum wage. One variation of this argument stipulates that if employees are not paid a “living wage,” then they are being paid below-subsistence wages and cannot

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<sup>14</sup> Wilkinson, 351-374 and Neumark, 37.

<sup>15</sup> Wilkinson, 351-374.

<sup>16</sup> Neumark, 37.

afford housing, food, shelter, and other essentials. Therefore, if employers do not pay for these necessities, then either the employees' friends or family cover the costs or society does in the form of social welfare benefits. In either case, employers shirk their ethical duty both to employees and to society. If employees who work for minimum wage are frequently not those living in poverty, however, this argument does not hold.<sup>17</sup>

## Fairness

Some hold the view that the market will determine the "fair" wage given the supply of and demand for an employee's skills. In reality, however, the wage-setting process is more complicated and is largely a result of the bargaining process between labor (employee) and capital (employer). While the supply and demand for labor broadly influence this interaction, it is a more complex process, impacted by the relative bargaining power of each side. The final wage is therefore likely to be skewed by other regulations, local issues, unemployment rates, individual idiosyncrasies on either side of the bargaining table, and so on. Frequently, bargaining power lies with the employer to a degree disproportionate to supply/demand considerations, causing the "fair" market wage to be distorted.<sup>18</sup> A related issue is that wages are not necessarily "fairly" set according to worker productivity, as some may expect (i.e. workers should be compensated according to their productivity or according to their productive contribution to society), but by how scarce the supply and demand of that labor is, as noted above. Accordingly, one hears the frequent lament that productive manual laborers or socially productive employees like teachers get paid low wages while athletes and celebrities receive millions in wages. While some believe this is unfair, others may argue that it, in fact, is the fairest outcome of all. Many can teach or build, but very few can throw a 100-mph fastball. The result we see in the United States today is that of a Miltonian economic world where business and the laws of supply and demand predominate. Individuals receive wages based on supply and demand and an individual's ability to negotiate, rather than based on worker productivity or the contribution a particular worker or profession is making to society.<sup>19</sup> Whether this is good, bad, or neither is simply a matter of perspective.

## Managerial Wage Setting

While understanding the relevant ethical issues related to the minimum wage is critical, it is insufficient for decision-making as a manager or business owner. The ethical and economic concerns discussed thus far contribute to the underpinnings of federal and local laws and minimum wage policies, but they do not necessarily restrict business decisions except in cases in which the law stipulates a requirement outright. While laws specific to business are binding for managers, they only serve as the ethical floor. It is the line society

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<sup>17</sup> R.E. Prasch and F.A. Sheth, "The Economics and Ethics of Minimum Wage Legislation," *Review of Social Economy*, 57 (1999): 466-487.

<sup>18</sup> Prasch and Sheth, 466-487.

<sup>19</sup> Prasch and Sheth, 466-487.

has decided business leaders should not cross, but it is not necessarily the line to which business leaders should aspire. Our discussion thus far, from consequentialism and deontology to ethical principles related to exploitation, freedom, economic justice, and fairness, has only shown how complicated the question of wage setting really is. Like most ethical questions, there does not appear to be one right answer and each manager may rely on different ethical criteria to reach different conclusions on ethical wages. So what is a manager to do?

The practical reality is that once all laws are satisfied, it is up to each business owner to make that choice. In a setting of unclear ethics, the key decision is simply on which side to err: on the side of economic justice and the “living wage” by offering greater wages at the expense of profits or higher prices, or on the side of consequentialist beliefs that higher wages will not lead to “better” consequences, whether they be higher profits for shareholders in a public company (fiduciary responsibility) or lower prices for consumers. In line with this framework, economists have argued that “firms are not price-takers but have a considerable degree of discretion over the level of wages that they pay ... so firms ... can choose between high-road and low-road growth strategies ... A high-road firm chooses to pay high wages with good benefits in an effort to elicit high levels of effort from employees while a low-road firm favors the use of punitive measures to ensure the productivity of its workers. However, low-road strategies are not necessarily cheaper since additional managers must be hired to supervise and discipline workers when their wages are too low to elicit a voluntary contribution of effort.”<sup>20</sup>

The two extremes we have seen so far are firms that pay the minimum wage as required by law and, most recently, the case of Dan Price and Gravity Payments with a \$70,000 minimum wage. The latter continues to be a case study in the ethical and economic consequences of an extremely high minimum wage and the story continues to evolve. At the same time, as more cities and states move towards a \$15 minimum wage, we will continue to be able to not only study the economic consequences of these efforts but to debate the ethical ramifications of the minimum wage at a policy level, as well as wage setting at a corporate level. In the meantime, the individual business decisions of a manager will continue to be just that: individual, above the floor set by law, but otherwise in accordance with idiosyncratic economic pressures and individual ethical beliefs. As individual business leaders and as a society, however, we must remain vigilant for significant ethical breaches in wages and treatment of workers since the law, as history has shown us, is frequently insufficient and slow-moving. To do so, we must first and foremost be aware of the relevant ethical issues. While we may reach different conclusions on particular questions like the minimum wage, continuously engaging with and discussing the ethics of business decisions can on their own prevent us from going astray.

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<sup>20</sup> Prasch and Sheth, 466-487.

# The Ethical Implications of Offshore Outsourcing

BY MAX S. BLACHMAN

EMORY UNIVERSITY GOIZUETA BUSINESS SCHOOL, CLASS OF 2017

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## Introduction and Key Themes

At the root of all studies of business ethics is some version of a question that has been asked and answered for decades if not centuries: *Why does business exist?* While this is an economic, moral, psychological, and sociological question, it is also an existential one tied directly to the foundations of the liberal capitalism practiced in Western countries such as the United States, Great Britain, and Germany. True to the trope — *two economists, three opinions* — prominent authorities have widely divergent views on the purpose of business in society.

There are two basic schools of thought. On the one side are the “Friedmanians.” These loyal followers of the prominent 20<sup>th</sup>-century economist Milton Friedman are strident in their adherence to Friedman’s contention that “... there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.”<sup>1</sup> Corporate leaders in the late 20<sup>th</sup> century drew heavily on Friedman’s economic teachings to justify their contention that the sole purpose of business was the creation of value or generation of returns for shareholders. At the opposite pole is the philosopher and economist Charles Handy, who espoused a contrary view from his perch on the faculty of the London Business School. Handy saw a more expansive role for business in society with companies having social responsibilities beyond their compliance with the law. Business does not exist, Handy argued, to “... make a profit, full stop. It is to make a profit so that business can do something more or better.”<sup>2</sup>

Implicit in Friedman’s invocation of the “rules of the game” is a fundamental belief in a zero-sum economic environment with distinct winners and losers. Handy stakes out a different position in which the conduct of business must have a deeper connection to

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<sup>1</sup> Milton Friedman, “The Social Responsibility of Business is to Increase its Profits.” *The New York Times Magazine*, September 13, 1970.

<sup>2</sup> Charles Handy, “What’s a Business For?” *Harvard Business Review*, December 2002.



human dignity. For example, Friedman viewed employees “as the property of the owners ... recorded as costs, not assets,” whereas, Handy contended that employees are “assets ... to be cherished and grown.”<sup>3</sup> The divide between Friedman and Handy is embedded in most major controversies related to business ethics, and the topic of offshore outsourcing is no exception.

## Asking the Key Questions and Defining Terms

This paper aspires to determine whether US-based companies behave ethically when they outsource business process or information technology (IT) services to offshore locations. The response requires asking and answering three more questions, including the following: (1) Is complicity in unethical or immoral behavior an inescapable reality of participation in the advanced, interconnected economy of the 21<sup>st</sup> century? (2) In order to adhere to ethical business practices, must an American company abstain from offshore outsourcing components of its business? (3) Will that abstention benefit the American people? Before answering these questions, one requires a common definition of terms and a working knowledge of offshore outsourcing as a practice.

Offshore outsourcing is a form of international trade. Outsourcing is the practice by which companies sub-contract a replicable component of their business process, typically one that is capital-intensive and non-core, to a separate company that does cheaper or higher quality work. For example, The Coca-Cola Company outsources the bottling and distribution of the beverages it sells in retail outlets in order to focus internal resources on higher value activities, such as product development and marketing. Offshoring, on the other hand, is the practice by which a company locates a component of its business process in a foreign country at least a day’s travel from that company’s base location. If the company retains full control of that foreign operation, then the practice is known as a foreign direct investment (FDI). Alternatively, if the company hires another company to handle the same foreign operation, then the primary company is offshore outsourcing that operation. Put succinctly, offshore outsourcing is the practice by which a primary business subcontracts a component of its operations to a secondary, separate company with the resultant work occurring in a foreign location.<sup>4</sup>

## Offshore Outsourcing of Goods in Historical Context

While the offshore outsourcing of goods production and services is a common practice for multinational companies, the exponential increase in offshore outsourcing of services is a relatively new phenomenon. While this essay primarily addresses the offshore outsourcing

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<sup>3</sup> Handy, “What’s a Business For?”

<sup>4</sup> Christopher J. Robertson, Anna Lamin, and Grigorios Livanis, “Stakeholder Perceptions of Offshoring and Outsourcing: The Role of Embedded Issues,” *Journal of Business Ethics* 95 (2010): 167.

of services, a quick primer on the offshore outsourcing of manufactured goods will inform the primary discussion. There are many practical reasons why companies offshore outsource a component of their businesses with the most common including cost-containment, delivery speed, and specialized skills.<sup>5</sup> Although the means have changed throughout history, outsourcing and offshore outsourcing are realizations of the basic economic theory of comparative advantage.

Midway through the 20<sup>th</sup> century, the dramatic growth of corporate America, access to new global markets, and an increasing demand for inexpensive manufactured goods by American consumers led to major changes in how American companies did business. Many companies offshored their manufacturing operations to realize the cost reductions required to reduce prices on consumer goods and maintain healthy financial returns for shareholders. Predictably, this practice created winners and losers. The winners were the consumers who purchased cheaper goods and the shareholders who profited. Further winners were the low-wage laborers in those foreign countries to which work was offshore outsourced, who now had access to jobs that would otherwise not have existed. The losers were working people in the U.S., typically low and middle-skilled laborers, who lost wages or their jobs, with ripple effects that crippled entire U.S. communities surrounding now empty factories.

## Offshore Outsourcing of Services: An Industrial Revolution

Since the early 1990s, massive increases in computing power, modernization of communications technology, and an increasingly educated global worker population created innumerable opportunities for companies to expand their offshore outsourcing practices. Contemporary business practices now include the use of “foreign subsidiaries, foreign acquisitions, offshore development centers, joint ventures or alliances, and foreign contracting.”<sup>6</sup> A textbook example is the boom in business-process outsourcing that began with American companies in the services industry hiring Indian vendors for their cheap, low-skilled labor. As offshore outsourcing evolved and expanded, India’s workforce and outsourcing industry evolved as well, allowing Indian companies to offer much higher order services to the same American companies that had initially hired them for low-skilled labor. The threat to the American worker shifted from the displacement of low-skilled knowledge workers to the replacement of middle and high-skilled white-collar

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<sup>5</sup> Rainer Lanz, Sébastien Miroudot, and Hildegunn K. Nordas, “Offshoring of Tasks: Taylorism Versus Toyotism,” *World Economy* 36 (February 2013): 194-212.

<sup>6</sup> Peter Haried and Derek Nazareth, “Examining International Information Technology Sourcing Through an Ethical Lens: An Application of Alternative Ethical Frameworks,” *Business & Professional Ethics Journal* 28 (2009): 65.

workers. In fact, a 2013 study stung white collar workers by suggesting that 20-29% of service jobs in developed countries could be outsourced offshore in the future.<sup>7</sup>

While the offshore outsourcing of goods production evokes images of sweat shops and child labor in the collective conscience of many in the developed world, there is something discordant about white-collar work flowing from the developed to the developing world. If, as noted economist Alan Blinder stipulates in a 2006 issue of *Foreign Affairs*, offshore outsourcing represents the “industrial revolution” of the “information age,” then this revolution also represents a fundamental shift in the meaning and implications of offshore outsourcing as an economic concept.<sup>8</sup> After all, revolutions are neither tamed by moral outrage nor easily harnessed. It is this lens through which I will assess services-specific offshore outsourcing.

## An Ethics Review for Offshore Outsourcing of Services

There are two broad categories of ethical conflict inherent to the offshore outsourcing of services. The first is upstream, which comprises the opportunity costs and benefits associated with a domestic operation should the work shift offshore. The second is downstream, which comprises similar considerations from the perspective of the offshore operation. The benefits of the offshore outsourcing of manufactured goods are visible in the inexpensive consumables lining the shelves of big box retailers across the U.S., and, arguably, in the corresponding high levels of employment in the bustling factory towns across Asia. As mentioned above, the disadvantages include the preponderance of empty factories that litter the American Midwest and South and the structural unemployment among American workers that has contributed to a spiraling economic decline in many once robust American manufacturing towns. Libraries are full of books detailing the economic, ethical, and political debates over the merits of offshore goods production. Individual views tend to break down along partisan or regional lines. As recently as 2016, 80% of Americans said that “increased outsourcing of jobs to other countries hurt American workers” and 57% believed that the “increased use of contract or temporary workers” is also harmful.<sup>9</sup>

## Complicity, Futility, or Both

As previously stated, offshore outsourcing raises troubling questions. Advocates for the practice of offshore outsourcing will point to statistics reporting minimal job losses or wage suppression, whereas opponents will point to studies claiming the reverse.<sup>10</sup> Yet, this

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<sup>7</sup> Lanz, Miroudot, and Nordas, 194-212.

<sup>8</sup> Alan Blinder, “Offshoring: The Next Industrial Revolution?” *Foreign Affairs* 85 (March 2006): 113-128.

<sup>9</sup> Pew Research Center, “The State of American Jobs,” *Social and Demographic Trends*, October 2016, <http://www.pewsocialtrends.org/2016/10/06/the-state-of-american-jobs>.

<sup>10</sup> Haried and Nazareth, 65-94.

is ultimately a question of fairness, entitlement, and perspective. Is it fair for an Indian company full of Indian computer programmers to compete with an American full of American computer programmers for business? Is it only fair if the living conditions and wage standards for both companies are the same? If a programmer in Bangalore has the same skills as a programmer in Atlanta, why should both not compete for the same job? These questions are easier asked than answered. One might get stuck in moral relativism and unreasonable projections of one nation's values at the expense of real-life individuals. To stabilize this rift, one might posit a shared standard for all hiring decisions. For example, one might argue that all foreign employees of American companies and their contractors deserve a work environment that maintains or improves upon the quality-of-life they enjoyed prior to starting the job. This standard would be a useful starting point.

To revisit the example of the American and Indian computer programmers, there is every reason to believe that both would benefit from the job. The Indian would almost certainly experience a boost in his or her quality of life by working, even indirectly, for an American company. While the same would be true for the American worker, other job alternatives available to him or her would most likely be far more attractive than other job alternatives available to the Indian worker. When the Indian worker is hired over the American worker, does the relative improvement in quality of life for the Indian balance out the relative decline in quality of life for the American? Even if an equation existed to evaluate the trade-offs involved, the ultimate assessment would remain subjective. Yet, if a different decision were made and the multinational company elected to hire a more expensive, American programmer, what then? This raises the question: "If I don't do it, they will, and then what?"

Let's assume that there are two American companies of equal size and market-power competing on a global scale. Company A decides to offshore outsource a portion of its IT services to an Indian firm in order to realize cost savings, while Company B conducts all of its IT services in-house. Company A decides to plow those cost savings into a marketing campaign that drives their business at Company B's expense. Over time, Company A captures enough market share to drive Company B out of business entirely. Now, rather than laying off a subset of its American workers like Company A, Company B must release its entire workforce. Which firm behaved ethically? What if there had been a Company C and a Company D making the same calculations? That is the complexity inherent to these decisions.

A reasonable argument can be made that Company B would be fatally comprised by behaving in the most ethical manner. Was Company A the more ethical firm, after all? Similar questions were asked in far graver times. When the Nazi-led German government forced Jewish-owned companies to shutter their doors or divest ownership in favor of Aryan operators, non-Jewish merchants had to choose whether any ethical qualms they might have had with taking over Jewish companies outweighed their desires for commercial benefit. An Aryan furniture-maker, for example, might acquire a previously

Jewish-owned competitor despite that Aryan merchant's underlying opposition to Nazi policies. He may have done so to prevent a rival merchant from making the same acquisition and gaining a competitive edge. Alternately, the non-Jew might decide not to take over the Jewish business and go out of business as a result. Either decision is logical. Are they also ethical? A creeping sense of futility might erode the moral grounding that would otherwise guide the parties in such transactions. With basic logic and textbook economics failing to satisfactorily answer the key question of this essay, one must return to a deeper question regarding the meaning of ethics. To deepen this exploration, one must draw on several ethical frameworks.

## Structural Ethical Divisions

The two major camps in the philosophy of ethics are the consequentialists and the non-consequentialists. Consequentialists subscribe to the belief that actions are morally right if the results (consequences) of those actions are, on the whole, more favorable than unfavorable. Utilitarians, adherents of the most predominant consequentialist philosophy, are particularly relevant to this discussion. Utilitarianism leads to decision processes that weigh decisions on proverbial scales to determine whether a behavior or practice is ethical. A utilitarian would design a complex equation to determine whether the combination of domestic job losses, foreign job creation, access to cheaper consumer goods, higher profits for shareholders, and a multitude of other factors, would yield a net positive happiness score. If so, the behavior is deemed ethical, and vice versa. Many business professionals view their decisions through a utilitarian lens in seeking to balance the costs and benefits of a given choice.<sup>11</sup> When accompanied by efforts to mitigate the harms caused by offshore outsourcing, there is a strong argument in favor of the practice for the utilitarian.

On the other side of the discussion are the non-consequentialists who value principles of obligation, duty, and human dignity when making moral judgements. The most prominent non-consequentialist thinker, the philosopher Immanuel Kant, believed in the morality of behaviors that promoted "humans as free, intelligent, self-directed beings."<sup>12</sup> Kantian philosophers would reject this debate on offshore outsourcing outright, because they would disagree with a debate premised on an intellectual exercise that reduces the worth of domestic and foreign workers to figures on a spreadsheet. To Kant, this would be a dehumanizing, commoditization of human beings that denies their inherent rights to dignity. Nevertheless, the non-consequentialists frameworks of social contract theory and stakeholder theory are especially suited to address the matter at hand.

Social contract theory raises the bar high in assessing the ethics of any business practice, because it presents a standard to "satisfy both the social welfare and justice terms of the

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<sup>11</sup> Haried and Nazareth, 65–94.

<sup>12</sup> Haried and Nazareth, 65–94.

social contract.”<sup>13</sup> Since the social contract is written to simultaneously bind customers to companies and employers to employees with a commitment to preserve the welfare of all parties involved, there is no utilitarian scale to balance the costs and benefits. Thus, the harm resulting from a single job lost to offshore outsourcing would suffice as reason enough to reject the practice — no matter the benefits.

Stakeholder theory is, perhaps, the most interesting framework within which to consider the ethics of offshore outsourcing. Similar to social contract theory, stakeholder theory promotes a more comprehensive approach to ethical decision-making. In a piece published in the *Business & Professional Ethics Journal*, the authors considered the very question of offshore outsourcing in the context of stakeholder theory. They suggested that the stakeholders included customers, IT employees, other employees, the local U.S. community, the IT offshoring provider, and the organization.<sup>14</sup> Additional stakeholders worth considering would be the company’s stockholders and the local community of the IT offshoring provider.

Hypothetically, that software engineer in the U.S. might struggle to find a new job after displacement and may even be forced to take a position for which he or she is overqualified and underpaid. Nevertheless, the degree of harm resulting from that fall from grace is likely to be less than the degree of benefit that an otherwise impoverished individual in the developing world would experience when offered a stable job for a livable wage. By broadening the universe of stakeholders, a more complex reality emerges.

## Conclusion

In the unsatisfactory way that business school professors and experienced professionals like to answer questions, the response to the key question set forth by this paper is: it depends. Company leaders must assess the comprehensive impact of their decisions when deciding whether to offshore outsource the service work that would otherwise occur onshore. In order to avoid an ethical tangle, a company should look to the long term consequences and indirect costs of their practices. If a company honors its commitments to workers and lives true to its professed values, which is a big “if,” then there are necessarily circumstances under which offshore outsourcing is an ethical practice. In practical terms, a company must survive to make such decisions. If offshore outsourcing becomes a qualifying criterion for a company to remain competitive in an increasingly globalized world, then moral quibbles may fall by the wayside. It would be unethical, in fact, for that company to not engage in the practice if the certain result was a halt to business entirely. Thus, it would be incumbent upon such a company, and all companies like it, to find ways to set right whatever harmful externalities result from their offshore outsourcing. This is the challenge of the time for private enterprise.

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<sup>13</sup> Haried and Nazareth, 65–94.

<sup>14</sup> Haried and Nazareth, 65–94.



# Only 2 Degrees Banks and Climate Change

BY KORA KRAUSE

EUROPEAN SCHOOL OF MANAGEMENT AND TECHNOLOGY (ESMT),  
MBA 2013

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Picture a very foggy day in San Francisco, but when you breathe in the heavy air it is surprisingly dry and reminds you of fire crackers in downtown Manhattan on the Chinese New Year. Two years ago I spent some time in Beijing. It was winter and the city was experiencing very bad smog levels, mainly caused by coal combustion from factories and energy and heat production close to the city.

Every few hours, the United States embassy in Beijing publishes the level of fine particulate matter in the air, known as PM 2.5 levels, to indicate the air quality. On many days my smartphone app would say “hazardous” with a warning to not leave the house. Pollution levels were over 15 times higher than what is considered safe by the World Health Organization.

I had spent three years of my career working in the climate change/ NGO sector and I had always been optimistic about the future. I believed that new technologies would find solutions, market mechanisms, such as carbon trading, would regulate emissions, or the international community would finally agree on a climate treaty. That winter in Beijing I nearly lost hope.

Scientists say time is running out. There is an international consensus that a temperature increase of more than 2 degrees Celsius (3.6 degrees Fahrenheit) above pre-industrial levels<sup>1</sup> would trigger a cascade of cataclysmic changes that would include extreme heat-waves, declining global food stocks, and a sea-level rise affecting hundreds of millions of people and leading to massive migration.<sup>2</sup> To prevent a further temperature increase we need to reduce greenhouse gas emissions to nearly zero by the middle of the century.

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<sup>1</sup> For more information, see World Resource Institute, “Understanding the IPCC Report,” (Washington, DC: World Resource Institute), <http://www.wri.org/ipcc-infographics>.

<sup>2</sup> Sophie Adams, *et al.*, World Bank, “Main Report: Turn Down the Heat: Confronting the New Climate Normal,” (Washington, DC: World Bank Group, 2014), <http://documents.worldbank.org/curated/en/317301468242098870/Main-report>.

I want to point out the responsibility of the Western world and the high level of injustice in this matter: Climate warming was mainly created by the industrial Western world — namely the U.S. and Europe — but will mostly affect poor people in developing countries. Climate change was recognized as a human rights issue during the United Nations Climate Summit in Paris in 2015.<sup>3</sup> The health of local communities has already been heavily impacted by coal-fired power plants and coal mining in developing countries. Tar sand and oil drilling is being conducted without the informed consent of the local population. Moreover, the impact will particularly hit future generations, which have no voice in today's climate debates.

After I returned from China I followed a different career path than one focused on climate change, and I decided to accept a job at an international bank. I got caught up in my new role and have to admit that I only followed the Paris U.N. Climate Change Summit halfheartedly.

## The Paris Agreement and Big Banks

Under the so-called “Paris Agreement” that was entered into at the Climate Change Summit,<sup>4</sup> the international community of states agreed on climate protection goals that would keep global warming below 2 degrees Celsius, and it further agreed to make finance flows consistent with a pathway toward low greenhouse gas emissions.

One cannot yet predict if all 195 governments will be able to act on these targets,<sup>5</sup> and I was pleasantly surprised that financial institutions were identified as crucial drivers in reaching the two-degree (known as 2C) target. I became curious: What is the responsibility of major banks in this ethical question of climate change prevention and how much impact can they have?

Through lending, investment, and other financial services, international banks play a key role as financial enablers. They have the power to either finance or not finance certain transactions or even industries. To fulfill the Paris Agreement, they would need to

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<sup>3</sup> Ryan Brightwell, BankTrack, “Banking with Principles? Benchmarking Banks against the UN Guiding Principles on Business and Human Rights,” (Nijmegen, Netherlands: BankTrack, 2014), [http://www.banktrack.org/download/5412388/banking\\_with\\_principles\\_june2016update.pdf](http://www.banktrack.org/download/5412388/banking_with_principles_june2016update.pdf); and Greenpeace and Amnesty International, “Joint Statement: Protection of Human Rights From Climate Change Requires Urgent Shift to 100% Renewable Energy for All,” December 8, 2015, <https://www.amnesty.org.nz/protection-human-rights-climate-change-requires-urgent-shift-100-renewable-energy-all-joint>.

<sup>4</sup> The Paris Agreement was negotiated within the framework of the United Nations Framework Convention on Climate Change (UNFCCC), an international treaty entered into in Rio de Janeiro in 1992. The Paris Agreement was negotiated by representatives of 195 countries at the 21<sup>st</sup> Conference of the Parties (COP) in Paris and adopted by consensus on December 12, 2015.

<sup>5</sup> Current Intended Nationally Determined Contributions (INDC) targets for the Paris signatories are forecasted to limit the increase in global temperatures to 2.7 degrees Celsius. Therefore these countries' future pledges must be progressively ambitious to meet the 2C target.

reallocate billions of U.S. dollars from fossil fuel exploration and power generation to renewable energy and investments in sustainable infrastructure.

Based on the available carbon budget, the Agreement stipulates that within the next 30 years, developed countries need to transform themselves into low-carbon economies and source their energy consumption from sustainable sources such as hydro, solar photovoltaic, thermal, or other technologies.

In December 2015, following the adoption of the Paris Agreement, many financial institutions, along with businesses, cities, civil society groups, and others signed a pledge driven by the Climate Conference called the “Paris Pledge for Action.” This pledge demonstrates that leading corporations support taking steps to ensure that the 2C target is met:<sup>6</sup>

... we realize that dangerous climate change threatens our ability and the ability of future generations to live and thrive ... taking strong action to reduce emissions can not only reduce the risks of climate change but also deliver better growth and sustainable development. As a result, we the undersigned, affirm our strong commitment to a safe and stable climate in which temperature rise is limited to *under 2 degrees Celsius*.

## Divest From Coal – Invest in Green

Coal-fired power plants are the biggest source of man-made CO<sub>2</sub>. Withdrawing financing from coal projects, therefore, would decrease future emissions immensely. Furthermore, the switch to a greener economy will require annual investments of at least \$1 trillion.<sup>7</sup> Private sector financing is necessary to close the huge investment gap and make this difficult transition possible.

In March 2016, a study by researchers at Oxford University stated that in order to have a 50% chance of holding warming to 2 degrees or less, no new coal or gas power plants can be built after 2017, unless they are fitted with expensive equipment to capture emissions.<sup>8</sup> At the same time, another study from 2016, commissioned by the Sierra Club and Greenpeace, revealed that 338 gigawatts (GW) of new coal capacity is under construction

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<sup>6</sup> “The Paris Pledge for Action,” (Cambridge: University of Cambridge Institute for Sustainability Leadership, 2015), <http://www.parispledgeforaction.org/about>.

<sup>7</sup> Tom Randall, “Renewable Energy at \$254 Billion? Let’s Make It a Clean Trillion,” *Bloomberg*, January 16, 2014, <https://www.bloomberg.com/news/articles/2014-01-16/renewable-energy-at-254-billion-let-s-make-it-a-clean-trillion>.

<sup>8</sup> Alexander Pfeiffer, *et al.*, “The ‘2°C Capital Stock’ for Electricity Generation: Cumulative Committed Carbon Emissions and Climate Change,” (Institute for New Economic Thinking at the Oxford Martin School, January 2016).

globally, while another 1,086 GW is planned. This is the equivalent of 1,500 coal-fired power plants.<sup>9</sup>

## Shorting the Targets

At odds with international emission targets, coal production globally has increased by 69% since 2000.<sup>10</sup> Over 70% of coal financing comes from only 20 international banks.<sup>11</sup> A group of NGOs estimated in a recent report<sup>12</sup> that 25 leading North American and European banks financed operators<sup>13</sup> of coal power plants with a total of \$154 billion between 2013 and 2015.

Moreover, although leaders of climate-vulnerable countries called for a global moratorium on new coal mines, the same study found that the banks it analyzed financed companies active in coal mining with \$42 billion (led by Deutsche Bank at \$7 billion); owners of high-risk extreme oil reserves (Arctic, tar sands, and ultra-deep offshore) with \$307 billion, and companies involved with LNG<sup>14</sup> export terminals in North America with \$283 billion (led in both cases by JP Morgan with \$38 billion and \$31 billion, respectively).

The way these figures were calculated might not be exact (the methodology has been questioned by some), but still, looking at these large investments in fossil fuels may lead one to wonder whether the banks are actually betting against the realization of provisions of the Paris Agreement and adherence to emissions targets.<sup>15</sup> Some of these institutions have signed the Paris Pledge for Action but continue to invest in projects and sectors that are defined as soon to be “stranded assets,”<sup>16</sup> according to the 2C target. Investing in ultra-

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<sup>9</sup> Christine Shearer, *et al.*, *Boom and Bust 2016: Tracking the Global Coal Plant Pipeline*, (Coalswarm, Sierra Club, and Greenpeace, March 2016), [http://sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/final%20boom%20and%20bust%202017%20\(3-27-16\).pdf](http://sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/final%20boom%20and%20bust%202017%20(3-27-16).pdf).

<sup>10</sup> Heffa Schücking, *Banking on Coal*, (urgewald, November 2013), [http://www.banktrack.org/download/banking\\_on\\_coal/banking\\_on\\_coal\\_updated.pdf](http://www.banktrack.org/download/banking_on_coal/banking_on_coal_updated.pdf).

<sup>11</sup> Yann Louvel, Ryan Brightwell, and Greig Aitken, *Banking on Coal 2014: Bank Financing of Coal and Coal Power, and Why It Must Stop*, (BankTrack, 2014), [http://www.banktrack.org/download/banking\\_on\\_coal\\_2014\\_pdf/banking\\_on\\_coal\\_2014.pdf](http://www.banktrack.org/download/banking_on_coal_2014_pdf/banking_on_coal_2014.pdf).

<sup>12</sup> Rainforest Action Network, Sierra Club, BankTrack, Oil Change International, *Shorting the Climate: Fossil Fuel Finance Report Card 2016*, (Rainforest Action Network, 2016), [https://d3n8a8pro7vhmx.cloudfront.net/rainforestactionnetwork/pages/15942/attachments/original/1475516884/Shorting\\_the\\_Climate\\_vWEB.pdf?1475516884](https://d3n8a8pro7vhmx.cloudfront.net/rainforestactionnetwork/pages/15942/attachments/original/1475516884/Shorting_the_Climate_vWEB.pdf?1475516884).

<sup>13</sup> “Coal producers” refers to companies that meet one or more of the following criteria: derive 30% or more of their revenue from coal mining, coal transportation, coal-to-liquids operations, or the production of specialized equipment for the coal mining industry; produce more than 20 million metric tons of coal annually; are expanding any coal mining operations or coal infrastructure projects (e.g. building, expanding, or acquiring new coal mines, coal export terminals, or coal-to-liquids facilities).

<sup>14</sup> Liquefied natural gas (LNG) is natural gas that has been converted into liquid form for ease of storage or transport.

<sup>15</sup> Although the capital supply for coal mining is shrinking, banks analyzed by the previously mentioned NGO report continue to finance coal-intensive electric power producers. Extreme oil and LNG are being supported at nearly unconstrained levels, according to the report.

<sup>16</sup> Stranded assets are “assets that have suffered from unanticipated or premature write-downs, devaluations, or conversion to liabilities.”

deep offshore oil reserves does not make sense if, according to the Paris emission targets, we will have to leave most of the Earth's fossil fuel reserves untouched.

Corporations are caught up in the dilemma of performing in a short-term economic system that is plagued by so-called agency problems<sup>17</sup> and behavioral biases in the financial system. If global political agreements are also likely to fail, who then has the power: who is ultimately responsible for the well-being of the next generations?

As a consequence of public pressure, some financial organizations have introduced stricter investment standards and have pledged, for example, to not support certain mining methods, such as mountaintop mining, which environmentalists say is particularly harmful. Still, action is slow and guidelines are kept vague. For example, some banks have pledged to stop financing coal-fired power plants in high-income countries.<sup>18</sup> This is a positive signal, but the lion's share of new coal power projects is located in developing countries where governments tend to be less restrictive and careful due-diligence would be even more important.

## Ethical Implications versus Business Interests

In this paper I am focusing on fossil fuels, since preventing climate warming used to play a role in my professional life. But we could also discuss financing particular deals in the defense industry, land-use (deforestation), or the textile industry. International banks have large stakes in these sectors and their responsibility to evaluate and then possibly influence these legal but mostly controversial industries is not well defined.

With no public mandate will private financial institutions really take the initiative needed and divest from fossil fuels as demanded by scientists?

Banks rely on quantitative risk and return calculations. The question is if and how financial institutions will or should incorporate ethical considerations into their investment decision processes. Since corporate responsibility with a focus on these critical industries is just partially regulated, there is no uniform approach. Some institutions have Reputational Risk Committees, which are akin to ethics committees, whose panel of experts comment or provide advice on certain transactions.

Furthermore and as mentioned above, most financial institutions have guidelines for responsibly investing in critical sectors such as mining, coal, or the defence industry. But

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<sup>17</sup> An "agency problem" can be defined as a conflict of interest inherent to a relationship in which one party is expected to act in another's best interests. In corporate governance, the agency problem usually refers to an interest conflict between the company's management and the company's stockholders.

<sup>18</sup> Pilita Clark, "JP Morgan to Stop Direct Financing of New Coal Mines," *Financial Times*, March 7, 2016, <https://www.ft.com/content/8ccccc10-e48d-11e5-bc31-138df2ae9ee6>.

due to the complexity of these industries, and their deals and financial products, such guidelines tend to be vague and difficult to apply. In the end, many investment decisions are individual decisions taken by individual business professionals.

Distributing responsibilities as well as holding someone accountable becomes increasingly difficult the larger a corporation gets. Within an institution, it is not easy to define who is in the end “responsible” for what.

According to Milton Friedman, who stated in his 1970s’ doctrine that the business of business is business, “there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.”<sup>19</sup> But as one can see in the case of the financial industry, even the rules of the game, our legal framework, are not a reliable boundary anymore.<sup>20</sup>

## Moral Duty and the Complex Effects of Our Actions

The philosopher Hans Jonas teaches us about the overriding moral duty to care for the future of mankind in an age in which technology has become “almighty.” He believes that this responsibility should grow with the increasing power of human beings and the corresponding opportunities for action. “A kind of metaphysical responsibility beyond self-interest has devolved on us with the magnitude of our powers ...,” says Jonas in a paper presented to the Wunsch International Symposium on “Ethics in an Age of Pervasive Technology” held in Jerusalem, in December 1974.<sup>21</sup> But in an increasingly complex world it is difficult to understand the cause and effects of our actions. The further removed the consequences of our actions are from the actions themselves, the easier it becomes to ignore these consequences.

## Professional Excellence versus Global Responsibility

Moreover, I believe that a concentration of specialists in large corporations narrows the organizational perspective and creates a one-sided bias. This is also true for the financial sector where you naturally find a higher concentration of backgrounds in business, economics, and math than in the liberal arts, humanities, or natural sciences.

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<sup>19</sup> Milton Friedman, “The Social Responsibility of Business is to Increase its Profits,” *The New York Times Magazine*, September 13, 1970.

<sup>20</sup> Banks list billions of dollars on their balance sheets as so-called “litigation provisions” to fund legal disputes resulting from operations that were performed in grey zones.

<sup>21</sup> Hans Jonas, “Responsibility Today: The Ethics of an Endangered Future,” *Social Research: An International Quarterly* 43 (1976): 77-97.

Of course, there are exceptions, but I am convinced that it is naive to expect certain business professionals, especially those in lower level positions, to make decisions that contradict corporate expectations and professional business standards, although it might be the right thing to do from a holistic social or environmental point of view. For example, a relationship manager who has worked with utility companies for all his or her career and whose work has been driven by sales performance, might not see the moral questions surrounding the financing of a bond to build a new coal-fired power plant somewhere in Africa or Bangladesh.

Cause and effect becomes increasingly difficult to determine, especially in organizational systems with a strong hierarchy and information asymmetry. Moreover, a lot of courage and foresight is needed to stand up to the status quo — especially in the context of corporate systems.

Top management is in the position and has the responsibility to evaluate business decisions with a holistic, integrated approach. But these decision-makers tend to be experts in a particular area themselves and therefore often trapped in the pitfall of professional short-sightedness.

## Business Complicity and National Socialism

The devastating politics of the 20<sup>th</sup> century — particularly the murderous dimensions of totalitarian systems such as those set up by national socialism — manifested a moral crisis on societal, individual, and professionals level that obligates us to emphasize the necessity for independent thinking and our “capacity to judge.”

Business complicity is a leading theme in the Nazi period since many corporations took advantage of shifting ethical standards and the new reality of the Third Reich. In the context of changing laws and regulations, corporations not only benefitted from slave labor and war supply production. They were also complicit through their work providing financing and insurance to — and benefitting from — the murderous Nazi regime.

In fact, history has shown that decision-makers in financial institutions were also highly complicit in the darkest chapters of contemporary history without even leaving their desks. Historians such as Gerald D. Feldman have pointed out that the practice of seeking opportunity, “however unusual the business,” brought banks and insurance companies in Nazi Germany very close to the Holocaust itself.<sup>22</sup> The financial sector financed and insured concentration camps as well as extermination camps in Nazi Germany. The German insurance company Allianz, today one of the largest financial service groups

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<sup>22</sup> Francis R. Nicosia and Jonathan Huener, eds., *Business and Industry in Nazi Germany*, (New York: Berghahn Books, 2004), 7.

globally, insured the barracks and other property at the camps, including at Auschwitz and Dachau.<sup>23</sup>

It is impossible to understand how “normal” engineers and business professionals at the economically troubled company of Topf & Söhne in Erfurt decided to design and produce the custom made mass extinction infrastructure used in Nazi concentration camps. This might be one of the most extreme examples of direct business complicity, but it drastically shows that professionals are often led by opportunistic benefits and considerations. These professionals were able to switch off their consciences, their morals, their emotions, and any feelings of responsibility. Is it also possible, that being experts in their disciplines is precisely what allowed these professionals to ignore the obvious consequences of their actions?

It is difficult to interpret what exactly moved professionals back then and what we could derive as consequences for business today. We could try to say that beyond professional excellence, businesses should strive to have a general human purpose and a culture that reminds employees to define their positive impact.

## The Identity Crisis of Big Banks

Banks are currently in an identity and purpose crisis. Multi-trillion dollar bailouts, multi-billion dollar litigation fines, criminal charges, and write-offs have turned the relationship and trust between society and financial institutions sour. Yet, the importance of banks to our globalized economy is greater than ever and their role in funding the transition to a more sustainable economy is decisive.

Public suspicion and increasing supervision by regulators have put banks under pressure. The six biggest banks in the U.S. and Europe have increased their assets almost five-fold since 1997.<sup>24</sup> More than 20 European and North American banks are rated as key to the global system by the Financial Stability Board, an international body monitoring the global financial system. Many of them are still too big to fail, which makes their roles and responsibilities as corporate citizens particularly interesting. The industry keeps struggling economically, but banks need to redefine themselves to focus on a meaningful legitimization for their existence. When, if not now?

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<sup>23</sup> Greg Steinmetz, “New Information Reveals Allianz Insured Nazi Camps,” *The Wall Street Journal*, June 3, 1997.

<sup>24</sup> International Monetary Fund, *Global Financial Stability Report—Moving from Liquidity to Growth-Driven Markets*, (Washington: International Monetary Fund, 2014), <http://www.imf.org/external/pubs/FT/GFSR/2014/01/pdf/text.pdf> ; and Yalman Onaran, “Too Big to Fail,” *Bloomberg*, January 12, 2017, <https://www.bloomberg.com/quicktake/big-fail>.



# Rethinking Purpose

The only way to preserve large banks' legitimacy and competitiveness would be to turn their tremendous capabilities for innovation to financing "consumer, social, and environmental solutions that benefit society while increasingly representing good investment opportunities for private capital,"<sup>25</sup> says Michael E. Porter,<sup>26</sup> a visionary thinker in the field of corporate strategy and competitiveness.

In my previous job, I worked with a large number of corporate social responsibility (CSR) departments that are usually responsible for environmental and social questions. Often they report to corporate communications departments, i.e. corporate PR, and their influence on the actual business is very limited.

To really implement sustainability and responsibility in business, one path could be to rethink the purpose of banks in the context of a shared value approach, according to which profit is generated by measurable business returns while addressing social and environmental challenges. The idea is to integrate purpose-generating shared value creation into all business considerations and activities and to move away from a "peripheral engagement with society through isolated corporate philanthropy, CSR, or sustainability programs"<sup>27</sup>. Banks would need to incorporate a link between social needs and business value in their measurement systems to assess the shared value produced. Financing solutions for global challenges such as sustainable energy would become a clear business goal.

Creating shared value could be an alternative path for conventional banking cultures that is worthwhile considering, since if banks were to shift their capabilities to create sustainable social and environmental growth they may also regain their standing in society.

From today's perspective this approach might look quite idealistic, but in the future, governments may decide to incentivize value-creating investments, although the question remains: who then decides what is in the best interests of society?

Such a shift in culture would require conviction at and implementation from the top. Nobody less than the CEO of a company is required in order to convince an organization of the benefits of a purpose-driven business. As mentioned above, the larger an organization is, the less likely someone in a lower level position is to initiate change.

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<sup>25</sup> Valerie Bockstette, *et al.*, *Banking on Shared Value: How Banks Profit by Rethinking Their Purpose*, (FSG's Shared Value Initiative, 2014), [https://sharedvalue.org/sites/default/files/resource-files/FSG\\_Banking%20on%20Shared%20Value\\_o.pdf](https://sharedvalue.org/sites/default/files/resource-files/FSG_Banking%20on%20Shared%20Value_o.pdf).

<sup>26</sup> Michael Porter is an economist, author, and professor at Harvard Business School. He is best known for his work on corporate strategy and competitiveness.

<sup>27</sup> Bockstette, *et al.*

Many corporations and, in particular, financial institutions have identified the importance of incorporating sustainability, as well as social and environmental considerations, into their decision-making processes. At the same time, it is astonishing how few institutions have put the topic on the C-level responsibility agenda. Maybe this is one of the reasons why the implementation of sustainability criteria is so poorly executed within most financial organizations.

One tool for implementing a cultural shift would be for businesses to hire more sociologists, philosophers, or environmentalists — you can get five for the price of one global markets manager. As Jonas has noted, “We know what is at stake only when we know that it is at stake.”<sup>28</sup>

Moreover, business professionals need to broaden their horizon and create an atmosphere of responsibility, not only for the sake of their businesses but also for the sake of future generations. Today’s revenue-centric incentive system needs to be aligned accordingly. Willingness to take responsibility, independent thought and judgment, as well as curiosity and an interest in other people and ideas, might be the most important qualities of future leaders.

## *Sensus Communis: Ubuntu*

Last but not least, banks’ stakeholders and particularly civil society have a responsibility to demand a more sustainable and long-term focused economic system. While governments and companies will need to be part of the solution to these massive global challenges, such as by preventing and adapting to climate change, ultimately it will be up to civil society and banks/investors to mobilize the capital needed to overcome them.

Today we live in a world of relative freedom and liberty. We need a decisive public sentiment that investing in non-sustainable resources will endanger future generations. Looking back in time, one can see that the abolition of slavery or apartheid was largely driven by societal movements. Two years ago, Desmond Tutu, a South African civil rights activist and retired Anglican bishop, said that tactics used against firms who did business with South Africa in the 1980s should now be applied to those who are part of the fossil fuel industry in order to prevent human suffering.<sup>29</sup> In this context, Tutu mentions that there is a South African word that describes human relationships: *Ubuntu*: “I am because you are.”

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<sup>28</sup> Jonas, 77-97.

<sup>29</sup> Desmond Tutu, “We Fought Apartheid; Now Climate Change Is Our Global Enemy,” *The Guardian*, September 20, 2014, <https://www.theguardian.com/commentisfree/2014/sep/21/desmond-tutu-climate-change-is-the-global-enemy>.

JOURNALISM  
PAPERS



# Introduction to Selected Journalism Papers

BY THORIN TRITTER

EXECUTIVE DIRECTOR, FASPE

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Under the guidance of Professors Ari Goldman and Lonnie Isabel, both from Columbia University's Journalism School, the 12 2016 FASPE Journalism Fellows formed a cohesive and tightly bonded cohort that was equally at home debating journalism ethics, editing each other's writing, or exploring the back alleys of Krakow. They were a joy to travel with and will be an impressive force to be reckoned with in the field of journalism.

The Journalism Fellows participate in seminar discussions about contemporary ethics topics and explore historic sites, much like the Fellows in all FASPE programs. However, unlike those in other fields, the Journalism Fellows also practice their craft while traveling, meeting in the "FASPE Newsroom" to write, edit, and publish pieces about the trip, which they then publish on the FASPE Journalism blog. One final piece of writing is done after the trip ends, when fellows submit longer feature pieces that explore a contemporary ethical issue in journalism. The following three pieces are examples of these feature pieces.

The first story is by Katrina Clarke, who writes about one of her least favorite tasks as a reporter, the "death knock" — when a journalist has to stand on a grieving family's doorstep to ask relatives about a family member who has died. Drawing on her own experience, as well as the experiences of others, Clarke explores the challenges journalists face and the reasons to nevertheless take such an assignment.

The second story, by Ilgin Yorulmaz, turns to a more contemporary political topic, exploring the role of journalists as unbiased observers when they have only limited access to information. Focusing on the political situation in her native Turkey, Yorulmaz asks whether reporting based on whomever grants access runs the risk of inadvertently turning an otherwise excellent piece of journalism into propaganda and what a reporter can do to prevent that.

The third piece, by Dayton Martindale, questions the impartiality that Yorulmaz seeks to maintain. Martindale examines situations in which journalists are in a position to intervene and offer assistance, but don't because of a desire to remain impartial. Martindale moves from these cases to a broader exploration of the reasons why objectivity became the widespread ideal in journalism and what may have been lost by giving up on advocacy.

I offer my thanks to the FASPE Journalism faculty and all the fellows for their dedication, thoughtfulness, and desire to make a difference in the world.



# When a Reporter Has to Make the “Death Knock”

BY KATRINA CLARKE

FREELANCE REPORTER, TORONTO

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Standing in the doorway of a man whose nephew died in a police shooting 36 hours earlier, I felt like an intruder.

“I can’t deal with this,” said Mejad “Jim” Yatim, a tired-looking man in a bathrobe, waving me away when I introduced myself as a reporter. “It’s a very tough time.”

Tears sprung to my eyes as I reached for a piece of paper to scribble down my email address. I was two months out of journalism school, and this was the first time I’d come face to face with a distraught person grieving. I felt guilty for intruding on his private pain, sad for what he was going through, and unprofessional for letting my emotions show.

I asked him to email me if he wanted to talk. Then I left.

The so-called “pickup” or “death knock” is hard for reporters. It often involves showing up on a doorstep on the worst day of a family’s life, asking about a loved one who’s just died. The best case scenario is they invite you in, share intimate details and help you paint an accurate, full picture of the deceased. The worst case scenario is they slam the door in your face and you skulk back to the newsroom empty-handed.

For some reporters, a vulture-like feeling of asking families to share private grief never goes away. For others, they find comfort knowing their actions — giving a family a last chance to share their loved one’s stories — serve a higher purpose.

But, as seasoned reporters, editors, journalism professors, and grieving families will tell you, there are right and wrong ways of approaching a grieving family.

## Reporters struggle with ethical implications of grief interviews

Lauren Miller was folding laundry on a Saturday morning in 2013 when she got the call.

Her editors at *Bloomberg* were sending her to Lac Megantic, Quebec, where a freight train had derailed and exploded, leaving scores missing and presumed dead. This was a huge get for a summer intern still in journalism school.

Miller eagerly accepted the assignment, hopped on a plane, landed in Quebec, rented an SUV, and drove straight to ground zero.

“Everything was so tranquil until you got to this downtown part,” she recalled. “It was just burnt. Everything was gone.”

Miller — then known by her maiden name, Murphy — started talking to residents. She spoke with a teenager whose brother was missing and a group of women sitting on a porch. One of the women’s young relatives was missing. She was dazed but agreed to an interview.

For Miller, the interaction was emotionally draining.

“I felt like such a grief vulture,” said Miller. “These people are on their porch grieving and I’m like, ‘Hey, do you want to talk into my phone and answer some questions?’”

The ensuing days were difficult, marked by one particularly disturbing incident.

Miller was on the street, walking away from a media scrum, when she overheard a woman talking to another person about her dead daughter-in-law and two grandchildren, who were all incinerated in the blaze. Miller stood transfixed, eavesdropping from a distance, when a swarm of reporters suddenly encircled the woman, shoving recorders and iPhones in her face.

After they left, Miller apologized to the woman for the other reporters’ actions. The woman thanked her.

Miller then trekked to a McDonald’s with the other reporters to access wifi. There, she overheard a reporter boasting about the great content she had for her story. “Got crying grandmother of two grandkids that died. Feature, written!” exclaimed the reporter.

“I was like holy f\*\*\*. You are talking about people,” said Miller, recalling her disgust at the reporter’s behavior, though she didn’t react at the time. “These are people. And sometimes ... we forget this is the worst day of somebody’s life and their whole family’s life.”

Miller’s experiences reporting in Lac Megantic left her shaken. For months, she had recurring nightmares about her loved ones burning in fires. She spoke to a counsellor, which helped her, but she eventually decided to stop covering hard news entirely. Miller now works as a freelance photographer and travel writer, roles she is happy in.



For other reporters, their aversion to grief interviews dissipates over time.

As a rookie reporter, *Toronto Star* crime reporter Wendy Gillis questioned if she was cut out for journalism, believing that interviewing grieving families was ethically dubious.

Six years of reporting experience later, she now understands the value of giving a family a platform to speak and is convinced talking to grieving families is an important, albeit always difficult, job.

“It’s kind of the least you can do,” said Gillis. “If somebody has taken away your relative, one thing you (as a reporter) can give back to them is a medium for their grief, for their sense of injustice ... and a way to memorialize somebody who is now gone.”

Gillis realizes not all families want to talk. To personalize the interaction, she always prefers to visit families in person, or at least to call them. If they don’t want to speak, she asks if another relative would, or she leaves a note and her contact information at the door. She describes her approach as “not pushy” and respectful — a method that sometimes entices a family to speak, other times not.

When a family does agree to talk, she recognizes her work may re-traumatize them. She gives them time to get comfortable with her and open up about memories of their loved one.

“The good details that really resonate with readers are the really painful ones that are hard to extract and hard for people to go over,” she said. “Like, the final moment of their son’s life. Or the final text message they got from them.”

Gillis now strongly believes it’s a reporter’s responsibility to give a victim’s family a chance to speak. Otherwise, the only information the public knows will be “name, age, date of death, way of death,” she said.

## Victims’ families tell reporters to be sensitive, patient

When a *London Free Press* vehicle pulled up outside Al and Pauline Newton’s London, Ontario home in 1997, just a day after a drunk driver had killed their daughter Catherine, their first thought was, “Oh God, here’s the press. Don’t we have enough to deal with?”

But between the time the reporter got out of his car and reached the doorstep, Pauline Newton changed her mind.

“I turned to my husband and I said, ‘You know what? Catherine’s story needs to be told,’” Newton said.

The Newtons spent well over an hour with the reporter, John Herbert, telling him how loved 20-year-old Catherine was and what her aspirations had been. Catherine was a “closet nerd” who would have been a great mother one day, they told him.

Herbert listened.

“Part of the healing process in grieving is telling your story,” Newton said. “Being able to tell our story and have this reporter listen and take notes, it helped us.”

The Newtons had another reason for speaking: they knew Catherine’s death — she was hit by a drunk driver while crossing the street — was preventable. They hoped to help stop similar tragedies from occurring in the future by telling her story.

“The public needs to be aware of what was lost and why,” said Newton, who, along with her husband, speaks to journalism classes about how to interview grieving families. “This is the victim, this is the life they would have had, and this was the cause.”

Nineteen years later, Londoners still remember Catherine Newton and the tragedy her family endured. But not all families are ready to speak in the immediate aftermath of tragedy.



“We were in shock,” said Joanne MacIsaac, recalling the days after a Durham, Ontario, police officer killed her brother, Michael MacIsaac, in Ajax, Ontario on December 2, 2013. “We went into family lockdown.”

But in the hours after the shooting, as her brother lay near-death in a hospital bed, Joanne MacIsaac distinctly recalls one interaction with *Toronto Star* reporter Jennifer Pagliaro outside St. Michael's Hospital. Pagliaro was there waiting for a press conference about an unrelated incident to start, and MacIsaac was waiting for more family to arrive. MacIsaac was distraught and Pagliaro noticed.

"Jennifer said, 'Why are you crying?'" said MacIsaac. "I said, 'My brother's been shot.'"

Pagliaro's response and compassion struck a chord with MacIsaac.

"The look on her face ... She looked sad. She looked like she felt bad for me," MacIsaac said, recalling that Pagliaro handed MacIsaac her business card before they went their separate ways.

For weeks after his death, Michael MacIsaac was known only as the "naked man," shot by police as he ran through a quiet neighborhood on a cold winter morning. Durham police did not release Michael's name, at the request of his family.

When the family did share Michael's name with the public, the MacIsaacs let Pagliaro into their homes. MacIsaac said she wanted to speak to reporters to "set the record straight" about who her brother was, beyond what was reported by the police.

In March 2014, Pagliaro wrote a touching, in-depth feature story about Michael MacIsaac, his heartbroken family, and his death. Reading the article felt therapeutic, MacIsaac said.

## Ethics experts say go with your gut

Karyn Greenwood-Graham knows what it's like to be on the receiving end of a reporter's death call. A Waterloo Regional Police officer killed her son, Trevor, who had mental health issues, during a botched drug store robbery in 2007. She remembers reporters staking out her Paris, Ontario home in the days after he died.

"It was a horrific time," said Greenwood-Graham. "You want to talk about the person who died but you're not sure who to talk to."

Today, she is the founder of a self-advocacy group called Affected Families of Police Homicide. Part of her role involves reaching out to victims' families and helping them deal with media. One of the first things she tells families who want to speak to the press is: "interview the interviewer."

"Make sure you feel comfortable with them," she said. "Ask them the questions that you want to know ... Are you a father? ... Do you have a family?"

For Greenwood-Graham, it's important that the interviewer feel genuine empathy with the family or that they try to understand what the family is going through.

Kathy English, the *Toronto Star's* public editor, believes empathy is one of the most important qualities a journalist can possess.

"(Empathy is) the ability to put yourself into someone else's shoes, into someone else's heart, to imagine what it feels like to be a mother whose child was just killed on the street," she said. "I think people know if you sincerely feel that."

At the same time, it's necessary to strive for objectivity, in the sense that reporters are able to see the facts clearly and ask probing questions, she said. English firmly believes there's value in asking a grieving family to speak and in aspiring to humanize their loved one, but reporters must also decide how far they'll go to get a story.

"You know inside what is right and what you can live with," she said, acknowledging that she recognizes rookie reporters are eager to land big stories and that the journalistic culture can promote big egos. "I think you have to know, do you have an ethical compass that goes beyond all that?"

English openly admits that as a journalist she sometimes lied to editors when they told her to push a grieving person who had already said no to an interview, telling her editors she returned to doorsteps when she hadn't. She knew her limits.

But for young reporters, a more personal concern might be showing real emotion. What if you cry? What if you don't?

"It's okay to show the emotion that you genuinely feel," said Larry Cornies, a journalism program coordinator with Conestoga College. "We are human," he said.

For broadcast journalists, showing real emotion can be a powerful tool — reminding the viewer that journalists have empathy, Cornies said. He pointed to CNN reporter Anderson Cooper's coverage of the Orlando gay nightclub shooting, including one broadcast in which the veteran reporter choked up reading victims' names.



Anderson Cooper reporting from Orlando for CNN in June 2016.

“To have that come through is amazing. That is professionalism,” Cornies said, adding that it would be problematic if a reporter got emotional during every broadcast.

For him, there is no question that reporters must accept that speaking with grieving families is part of the job. It may never get easier, but its value to journalism is intrinsic.

“It’s our responsibility as journalists to journal. You’re chronicling a day in the life of the world or your town or your community. Along with that is a lot of sad stuff and a lot of tragedy,” said Cornies. “There is value in honoring the loss of a person ... and making somebody more than a statistic.”

As for my own experience with Sammy Yatim’s uncle back in 2013, after he rejected my interview request, I returned to the newsroom, dejected.

Then, hours later, he sent me an email.

“Please forgive me. I have been fighting to sort out my emotions,” Yatim said. “Anger, pain, sorrow. All I can do is cry, ‘why not me?’ I probably deserved those bullets more than he did.”

He went on to say he didn’t want the public to retaliate against the police officer responsible for the death of his 18-year-old nephew, Sammy, who was alone on a streetcar holding a knife when police shot him. Nothing would bring him back, he said.

I had my story. It wasn’t a sit-down interview or an exclusive for the paper, but it gave the public a glimpse into the pain of a family reeling from a tragic loss, at a time when the violent incident was sending shock waves through the city.

As a person and a journalist, I felt good.

[Note: This piece was initially published by *J-Source* on December 8, 2016. It can be found at <http://www.j-source.ca/article/when-reporter-has-make-%E2%80%99death-knock%E2%80%99>]

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## Backstory

*One of the assignments I dread most as a reporter is the “death knock” — when you have to stand on a grieving family’s doorstep, asking them to talk to you about their dead relative.*

*As a human, I feel gross. As a reporter, I know it’s my job to give people a platform to share their stories.*

*During FASPE, the concept of empathic objectivity — the ability to write about other people’s lives from their perspectives, in a way that they would recognize themselves — helped me to reconcile my human instincts with my reporter responsibilities. It’s natural to feel guilty about intruding on a family’s grief, but it’s also a necessary and important part of our jobs to give families a chance to memorialize their loved one.*

*Our group discussions after visiting Auschwitz also helped me realize that it’s okay to feel and show emotion as a journalist, and that my emotions shouldn’t hold me back but motivate me to dig deeper into stories I care about.*

*Talking to compassionate journalists, insightful ethics experts, and victims’ families who spoke candidly, confirmed for me the importance of the death knock. I hope that by sharing their experiences, my story can serve as a guide for other journalists when they interview grieving families.*

KATRINA CLARKE

# Whose Truth Are We Telling?

BY ILGIN YORULMAZ

COLUMBIA UNIVERSITY GRADUATE SCHOOL OF JOURNALISM, CLASS OF 2016

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## Is it ethical to report a complex conflict from only one side under certain circumstances?

For an article published by *The New York Times Magazine* in May 2016, reporter Robert F. Worth traveled to Mardin province in southeastern Turkey to report on the latest episode of violence in the decades-long battle between Turkey and Kurdish separatists.

The main character in Worth's story was a Kurdish militant named Ömer Aydın — a mature and confident Kurdistan Workers' Party, or P.K.K., commander with a sense of humor, according to Worth, a former *Times* Beirut bureau chief.

On the face of it, it seems that hardly any Turkish sources appear in the article — official or otherwise — except for an academic based in Washington D.C.

Denied access by the Turkish military, or not wanting to parrot the official government line, Western journalists like Worth can't help but bypass important stakeholders when reporting such a story.

One such stakeholder was the mother of the Turkish soldier whom Ömer Aydın had killed and whose face Aydın couldn't forget: "At the end, they are human, too," he said. Soon after that conversation, Ömer Aydın was dead, too.

In a conflict as complicated as Turkey trying to put down a Kurdish rebellion on the edge of the brutal Syrian civil war in which both sides are combatants or participants, the questions about reporting on the conflict have gotten thornier. The debate over how to cover the Turkey-Kurdish conflict becomes even more combustible in the aftermath of the failed coup d'état in Turkey on July 15, 2016.

Does the approach of reporting on whomever grants access (or is likely to grab the biggest headline) run the risk of inadvertently turning an otherwise excellent piece of reporting into a mouthpiece for one side?

There is no easy answer.

## Dangers and obstacles in conflict reporting

When reporting any news story, a basic rule of journalism calls for interviewing sources from all sides.

Yet, in practice, this is often impossible in conflict reporting. Conflicts, by their very nature, are complex and dangerous for reporters. Just look at the second Iraq war, the Syrian civil war, Egyptian protests and their aftermath, or the Israeli-Palestinian conflict, in which dozens of journalists have been killed, injured, or jailed.

In my opinion, there are four common ethical issues raised for journalists in reporting each of these conflicts.

First, combatants vary widely in their definitions of basic concepts and labels, so that one side's "terrorist" is the other side's "freedom fighter." This is what presents the journalist with the most basic quandary before he or she even sets foot on the ground to report.

Since 1984, Kurdish insurgent groups headed by the P.K.K, have been fighting with the Turkish military to have greater political rights in Turkey. The P.K.K's ultimate goal is an independent Kurdish nation. The Syrian civil war is now five years old and Kurds in Rojova in the northern part of Syria have plans to declare an autonomous region within Syria, accelerating Kurdish nation-building efforts.

The P.K.K. labels militants such as Ömer Aydın as heroes fighting against an unjust, even fascist Turkish military — much like Palestinians view the occupying Israeli military or Sunnis in Syria view the Syrian army that serves Bashar al-Assad's Alawite (a branch of Islam close to the Shi'a branch) government. Hard-liners in Turkey think that the P.K.K. is willing to work with the Western press, but does not grant the same full access to the Turkish press, because this preference serves their media strategy of creating sympathy for the militants. Broad coverage of the lethal force used by the Turkish military shows the Kurdish side's savvy in its attempts to discredit Turkey's war on terror, according to these critics.

Yet, how are the Turkish government's policies different from, say, those of the U.S. government in pursuing targets belonging to a terrorist organization such as Al Qaeda? Or the Israeli government in targeting Hezbollah? As many Turkish people see it, the P.K.K. is able to get its message across loud and clear in the Western media, despite the fact that it is firmly recognized as a terrorist organization in the West.

A veteran reporter on Syria told me that on a reporting trip to the region, those journalists



who weren't able to embed with one group embedded with the opposite side. It was impossible to decide who was actually a freedom fighter or a terrorist member of Al-Nusra (an al-Qaeda affiliate), or a part of the Free Syria Army (members of the Syrian Armed Forces who broke away in 2011 and began fighting the Assad regime). "They killed an Alawite in front of our eyes," she said of her horrific experience of being embedded with one of the insurgent groups fighting the Syrian Army.

The second ethical dilemma is that while access to a great source is highly desired, presenting just that source's version of events is troubling. Should the price of access be to drop the journalism rule of telling all sides to a story?

When political developments in Turkey ended peace talks between the P.K.K. and the government in June 2015, the P.K.K.'s branch of patriotic youth started to barricade the streets in Kurdish-majority towns in southeast Anatolia in what was regarded by Kurdish nationalists as a "self-defense" effort. Turkish security forces responded heavily to clear the streets and imposed a curfew. In February and March of 2016, two suicide bombings by Kurdish militants killed 66 people in Ankara, the Turkish capital. In the past year alone, the conflict has cost the lives of hundreds of Turkish security forces, Turkish and Kurdish civilians, and P.K.K. insurgents.

I spoke to Worth about his decision-making process and the ethical challenges he faced while reporting specifically on his *Times Magazine* story. He told me that, from the beginning, his deliberate focus was on finding young P.K.K. militants behind the barricades. "My goal is to try to make these characters come alive. Who are they? What's motivating them?" Worth said.

The third ethical dilemma concerns the audience that the story targets. When CNN shows up in a conflict zone, its reporters are catering to a multinational audience that is different from that of a local paper, say, in Tel Aviv, Karachi, or Istanbul. A story like Worth's about the underreported Kurdish conflict was almost certainly going to touch upon ISIS, Worth told me. It's not just because the Kurdish conflict is an extension of the overarching ISIS conflict, but it shows that the editor made a deliberate decision to present an aspect of the issue (ISIS in this case) most likely to engage the average American. On the other hand, had this story been written for a Turkish audience, ISIS would probably have received very little mention, if any, because in Turkey the Kurdish conflict is much more of an everyday reality than ISIS is.

Furthermore, a Turkish audience would also find it unacceptable if there were no Turkish sources interviewed for an article on the P.K.K.

In our digital age, the audience has enormous influence over a story's popularity and newsworthiness. During my visit to Turkey this summer, I was asked several times in my meetings with Turkish professionals, industrialists, and business owners why the news

from Turkey in the international media was always negative. Referring to the rise of Taha Akgül, a Turkish wrestler and gold medalist in the 2016 Rio Olympics, one businessman asked me, “Why doesn’t anyone write about the rags-to-riches story of that wrestling medalist boy?” The answer is that it has little newsworthiness or context outside Turkey.

The fourth and final ethical issue for journalists is how to overcome government restrictions and censorship, or even self-censorship. Worth says that despite his efforts, he failed to get permission to embed with the Turkish military and chose not to approach local Turkish government bodies. “One would like to sit down with [and interview Turkish President Recep Tayyip] Erdoğan. He personally is the decision-maker of all that, so why talk to the second or third person in command?” he told me. I slightly disagree with this approach. Ideally, he should have insisted on talking to any source from the Turkish side, whether a public official or a civilian.

You might ask: What if Worth had decided to reach out to the governor of, say, Mardin province for an interview? Resentment against the Kurdish insurgency is so high in most Turkish-majority provinces that even if Worth had managed to secure an interview with the governor, the governor may have refused to be included in Worth’s story. A senior press adviser to President Erdoğan told me recently: “I notice that many government officials refrain from appearing in the same article with P.K.K. commanders. They think it’s an insult.” This official, who advises Erdoğan on which reporters to speak to, thinks this works against Turkey’s image. When a foreign reporter cannot (or chooses not to) talk to the governor and when the governor chooses not to grant an interview so as not to be seen as sharing a platform with a Kurdish militant, then the result can be incomplete, even biased reporting.

Moises Saman, who accompanied Worth as the photographer for his story, accepts that a journalist should try to interview both sides of a conflict and make an effort to reach the other side. “But when you know that’s not going to happen, what do you do?” he asks. He advises being practical: “If you wait, no story would ever get done. Just because one side blocked access shouldn’t be a reason to kill a story.”

After the failed coup d’état against the Turkish government on July 15 and an alleged assassination attempt on President Erdoğan, the Turkish government imposed a three-month state of emergency that began on July 21, 2016 and was extended on January 4, 2017 for a further three months. Accordingly, Turkey temporarily suspended The European Convention on Human Rights, a move similar to France’s derogation from the Convention after the November 2015 terrorist attacks in Paris and in France’s fourth extension of the state of emergency since then. This has meant temporary restrictions on publishing and the photocopying and distribution of newspapers, books, magazines, brochures, and printed matter deemed illegal under the state of emergency. This is another step toward a less free press, which will also almost certainly further impede reporting on regional conflicts.

Turkish media coverage of certain stories has indeed become more restricted. The state of emergency led to an immediate ban on publishing stories on events such as terror attacks or Turkish military operations aimed to bolster national security. Even if there are no apparent restrictions on a story, editors in Turkey now choose to self-censor to avoid the risk of prosecution. For example, CNN Türk ran an abstract of Worth's article soon after its publication. But they cut out certain parts and only published the sections where a civilian from Cizre criticizes the P.K.K. for the terrible mess they created in the town by getting into a war with Turkish government forces, and where a female sniper regrets taking part in a conflict of which she no longer sees the point.

The example of CNN Türk's approach to publishing Worth's story points to a fifth ethical issue specific to Turkish media in reporting on a conflict: the role of nationalism. The nationalistic stance taken by the mainstream Turkish media on sensitive issues related to Kurds, Armenians, and Alawites in Turkey is an historic problem. For a speech he gave to a conference in May on the coverage of the Turkish military campaign against Kurdish riots in the 1930s in what is today Tunceli (Dersim) in eastern Anatolia, prominent Turkish media critic Ragıp Duran analyzed hundreds of newspaper clippings. Duran found a systematic lack of information and news, one-sided reporting, a lot of biased language (such as calling the local public "primitive"), and propaganda. "Much like in the 1930s, today's pro-government media uses phrases like 'War on Terror,' 'PKK is finished,' and in an effort to link the Kurdish issue to external forces, 'Armenian progeny,'" said Duran in his written statement from the conference.

At the same conference, Duran also listened to the accounts of women from Cizre, the Kurdish town in the east, which bore the brunt of the latest military operation and which Worth also visited for his story. Duran suggests that reporters avail themselves of three key sources in order to support ethical reporting of a conflict: official documents (especially reports by foreign diplomats and organizations); academic papers on the sociology, psychology, and demography of the issue; and interviews with witnesses, like the women Duran met, using oral-history methodology.

Any coverage of the Kurdish conflict in mainstream Turkish media has mainly been from a nationalist angle. Earlier in 2016, Nazlı Çelik, a reporter for the pro-government Star TV station, was embedded with the Turkish military during operations in southeast Turkey. She filed a video report showing her next to Turkish forces blowing up a suspected militant hideout, as well as sharing meals with her at a makeshift dinner table. The reactions were mixed. Some hailed her as a hero, while others thought she was a show-off. Partisan reporters in a fact-challenged political landscape hardly do any service to the ethical reporting of the news. On top of that, as developments in technology allow users of social media to also become publishers, people tend to become more polarized after reading reports from their "own side."

In his new book titled *A Rage for Order: The Middle East in Turmoil from Tahrir Square*

to *ISIS*, Worth tells the story of two women who were childhood friends, one Alawite, the other Sunni, whose friendship falls apart during the Syrian war. Given his years spent living in the region and his extensive reporting time with both of the women, Worth was able to report extensively and give an accurate account of the conflict as seen by each side — a luxury, understandably, he didn't have in his *Times Magazine* piece on the Kurdish-Turkish conflict. Part of the difficulty with reporting conflicts around the world lies in the fact that when working in danger zones, foreign reporters have limited time to spend in the region, are bound by deadlines, and have very specific reporting goals. This reality and the distrust Turkish public officials have that a foreign publication will report on them fairly hamper a balanced approach to sourcing a story.

Even when a veteran reporter like Worth genuinely made the effort to engage with pro-government stakeholders or people outside the region, it was not possible to get the other side's view. The closest Worth got to this was when his team was detained briefly by the Turkish police during their time in Mardin. He told me he meant to ask the detaining officers how they felt about the Kurdish conflict. In the end, he refrained from asking this question, thinking it would jeopardize not just the story but perhaps also the team's safety. "I just think we journalists should adapt ourselves to the story and the situation," Worth told me.

One solution to the single source problem may be to employ local reporters who speak the language and know the culture. Furkan Temir, a young Turkish photographer who accompanied Worth and Saman in reporting the story, said that as a Turkish journalist, even *he* has trouble getting access to the government and military sources "unless one embeds with [the government's] own media organizations like Anatolian Agency, A News, or TRT, the state-owned Turkish Radio Television." Temir pointed out that the aforementioned distrust of media from the "opposite side" is present on the Kurdish side as well. He said the Kurds hesitate "to accredit" a journalist if a Turkish military member appears in one of his or her photographs.

In fact, there was one short-lived glimpse of hope in reaching out to the other side. *Özgür Gündem* is a Turkish-language Kurdish newspaper reporting on the Turkish-Kurdish conflict and is regarded by the Turkish authorities as a PKK propaganda outlet. *Özgür Gündem* recently started a guest editorship program whereby prominent journalists would edit the paper for one day. However, of the 34 or so editors who have done so, 17 have been detained by Turkish security forces on charges of terrorism propaganda. In August, *Özgür Gündem* was accused of being the media arm of the P.K.K and was closed down by the government.

Sometimes reporting both sides of a conflict as a responsible journalist can lead to a negative outcome for the journalist, as Andrew E. Kramer, who reports on Ukraine's two-year-old war, recently found out. Kramer wrote in *The New York Times* about how he ended up being blacklisted as a terrorist by a Ukrainian pro-government website for

“simply doing our jobs: reporting both sides of the war, including the pro-Russian rebel side.”

## What do we owe to our readers?

A recent article in *Columbia Journalism Review* reports the findings of research conducted last spring by the magazine and the George T. Delacorte Center for Magazine Journalism.

Researchers found that sometimes the content of a well-narrated story matters more than its sources — whether those sources are based on one side or the other in a conflict — even to politically polarized readers. Despite the lack of Turkish voices in his story, Worth’s extensive explanations of the historical context of the conflict and his full disclosure of the obstacles he encountered to accessing critical sources, leads me to believe that his story fits into that rare category.

In today’s highly populist and polarized media landscape, many Turkish readers will regard a story about P.K.K. militants by a Western journalist that does not include a Turkish official source’s comments as tipping the balance dangerously toward one side. As photographer Saman put it to me, “Truth is somewhere in the middle.”

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## Backstory

*We are going through very difficult times. Some call it the “new world disorder.” Democracy in Europe and elsewhere is in retreat. Politics have taken a sharp rightward turn in many countries from Hungary to the United States. The surge of the strongman’s rule is becoming inevitable with Putinism in the east and Trumpism in the west.*

*In such politically charged environments, journalists must act even more responsibly and tell the truth without any hesitation. Yet, sometimes, the truth is defined by certain circumstances and sources, none of which are in the hands of the journalists.*

*I first thought about constraints on truth when I read an article on the FASPE required reading list. At the beginning of World War II, as Nazi Germany was getting ready to murder Jews and to rule most of Europe, all foreign news agencies were forced out of Germany one by one, except for one: the Associated Press. The Associated Press chose to negotiate with the Nazi regime and to give up its independence in return for access to*

*Nazi-occupied Europe. The AP ended up being the only agency to report from Berlin, and it received enormous credit for it. But, one might ask, at what cost?*

*I decided to make the challenge of reporting on wars and conflicts as the main topic of my FASPE paper. Does the approach of reporting on whomever grants access (or is likely to grab the biggest headline) run the risk of inadvertently turning journalism into a mouthpiece for one side?*

*There is no easy answer.*

*During our trip to Auschwitz, we discussed the importance of truthful journalism when reporting on atrocities such as the Holocaust. For example, it was shocking for me to learn that for a long time, the American media was skeptical of and dismissed stories of concentration camps and the systematic torture and execution of Jews, saying that these stories were simply unfounded rumors. In one part of the trip, each fellow introduced a journalist or illustrator from the past whose conduct we wanted to analyze. During our visit to the House of the Wannsee Conference, we learned how pro-Nazi government publications, like Der Stürmer, manipulated the truth and published articles full of inaccuracies.*

*I believe I came out of the FASPE Fellowship as a better and more responsible journalist. On the one hand, there is increasing pressure today to do a story no matter whether it can be done in a balanced manner. On the other hand, there is the moral responsibility of the journalist to hear the story from both sides. “The truth,” one of the photojournalists told me during my reporting for my paper, “is somewhere in between.”*

ILGIN YORULMAZ

# Deciding When Intervention May Ruin the Story

BY DAYTON MARTINDALE

UC BERKELEY GRADUATE SCHOOL OF JOURNALISM, CLASS OF 2017

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A few years back, journalist Anne Hull went to Kentucky to write about welfare for the *St. Petersburg Times*. In the anthology *Telling True Stories*, she writes that she spent three separate one-week spans with the same family.

During the second week, the family's baby developed a fever, but they didn't have money for gas to take her to the hospital. Hull and her photographer's "rental car sat about two hundred feet away," she writes. "They were looking at it. I could, of course feel the ethical dilemma developing: 'Should I offer to drive them to the hospital in my car?'"

She decided not to at first:

I was there reporting a story about living on the edge. If I, an accidental visitor, solved their problem, then it would no longer be a true story. As a newspaper reporter, changing their situation didn't seem appropriate.

But, understandably, she didn't find waiting easy:

I started to think, "Why am I doing this job? This is horrible." I wanted to throw the notebook down, stop being the reporter, and take care of the baby. The photographer and I decided to wait just fifteen more minutes. The purpose of the story was to ask: What happens when the government money shuts off? What will people do then?

Hull got that story. Before the 15 minutes were up, the baby's father pawned a shotgun to pay for gas, and they took the baby to the hospital.

Consider another, similar case, also from *Telling True Stories*. Writer Sonia Nazario was following a young boy, Enrique, as he attempted to migrate into the United States:

[Enrique] struggled for two weeks in Nuevo Laredo, just south of the United States-Mexico border, to get the money to call Honduras for his mother's phone number in North Carolina. The piece of paper with the number on it had been stolen from him. He was washing cars, eating once a day, and really struggling. The whole time, I had a cell phone in my pocket. I knew that my intervention would significantly change the story; I would have had to start all over with another main character. Most important to my decision, though, was that Enrique was not in imminent danger.

Enrique did eventually find a phone, and Nazario wrote a Pulitzer Prize-winning series for the *Los Angeles Times* that she later adapted into a bestselling book, *Enrique's Journey*.

Neither Hull nor Nazario were available for comment for this piece.

In their essays, both journalists write that they would have helped had the situation become more dire (and in fact, Nazario writes that she did help a different boy who was not her main character and whose danger was more "imminent"). But who decides what constitutes a sufficiently dangerous circumstance — and would intervention necessarily ruin the story? These two cases each raise an obvious (though still important) question — should Hull and/or Nazario have intervened? But we can't answer that without at least attempting to address a larger, deeper question: What is journalism for?

## Objectivity and news outlets

Nazario is up front about her goals in telling Enrique's story: "In a city like Los Angeles where immigrants are often demonized, humanizing them is an important part of a newspaper's civic mission." Yet, she also understands the impulse to help:

[Reporters] must weigh the harm to an individual child against the usefulness of witnessing reality and conveying it powerfully to readers. Stories like *Enrique's Journey* can motivate our readers to think more about the issues and to act on them. As narrative reporters we must aspire to write the most moving stories we can. That is our mandate. It is all we can do.

For me, at least two things stand out about Nazario's framing of the discussion. First, her approach to journalism here is very much about advocacy. She does not appeal to journalistic impartiality, but rather argues that writing a certain type of story about a cause (in this case, humanizing immigrants) is actually more *useful* to that cause than intervening to assist in individual cases. Second, Nazario limits herself to her trade. Writing "is all we can do," she says.



I find several issues with this. As Nazario seems to, I think journalism can and should have an advocacy mission. But if so, I believe we should take her injunction to “weigh the [preventable] harm ... against the usefulness of witnessing reality and conveying it powerfully to readers” on a case-by-case basis. Perhaps in this case, showing Enrique’s struggle to find a phone is essential to humanizing him for readers. But it’s also possible that depicting him looking for a phone doesn’t add much that can’t be found in the rest of the story. In such a case, writing would not be “all we can do” — we can also lend Enrique our phone.

Nazario wrote that had she lent her phone to Enrique, she would have needed to start over with a new subject. But this also isn’t entirely obvious. The story may be a *better* story if it includes more hardship for Enrique, but, ethically, I don’t think that should be our sole standard. I think it’s at least debatable whether immigrants would be significantly more humanized by a story where Enrique struggled to find a phone than in one where he borrowed one from a reporter. (In fact, imagine that Nazario had offered him her phone, and he had given her a grateful hug — couldn’t that not also humanize?) In short, I am not convinced that giving Enrique a phone would have conflicted directly with Nazario’s goals for her piece.

But there is still the idea, common among many reporters, that inserting oneself into the story somehow taints it, a view apparently shared by Hull. Hull differentiates newspaper reporting, which “operates under the strictest of codes,” from other types of nonfiction, stating that “firmer boundaries” make newspaper reporters “freer to examine and explore.”

But that code is not etched in stone. Rather, it emerged over time, for specific historical reasons. In *Beyond Belief: The American Press and the Coming of the Holocaust, 1933-1945*, historian Deborah Lipstadt explains that during World War I, many U.S. journalists coordinated directly with the government to promote pro-war propaganda.

This was not terribly unusual in a profession fraught with naked partisanship and “yellow journalism,” but, according to Columbia University journalism professor Michael Schudson in *Discovering the News: A Social History of American Newspapers*, it was a key turning point. The public — and journalists themselves — began to question the supposed facts found in newspapers. The press turned to objectivity — a specific set of journalistic standards that had been around for decades but had not yet become dominant — as a way to restore confidence.

Thus, objectivity was a response to a real problem, but that doesn’t mean it is the only, or even the best response. Journalist Glenn Greenwald and other critics of objective journalism argue it contains an inherent bias toward those in power, and therefore results in pro-war propaganda of the sort it was intended to avoid.

It may also be an unattainable ideal. Lipstadt writes: “Neither the journalist nor the historian is completely objective. Their values inform their view and understanding of events, and thus influence the creation and interpretation of the historical record.”

But, according to the article “Objectivity Precludes Responsibility” by Stanford University journalism professor Theodore Glasser, which appeared in the February 1984 issue of *Quill*, “the “most important” consequence of objective journalism is that it’s “biased against the very idea of responsibility; the day’s news is viewed as something journalists are compelled to report, not something they are responsible for creating.”

There is a rich legacy of journalism that rejects the notion of complete objectivity, from the abolitionist newspapers of the early-to-mid-1800s, which included writers and editors who participated in the Underground Railroad, to George Orwell’s reporting on the Spanish Civil War, in which he also participated.

I do not want to dismiss out of hand the notion that the stricter code Hull talks about — while it would have prevented journalists from participating in the Underground Railroad — could also have helped them examine and explore their subject more freely. And I am not saying that intervention is always right, or that Nazario and Hull were necessarily wrong.

But I suspect that this self-imposed code of restraint can handicap reporters and deprive them of what could otherwise be great stories. Remaining detached and impartial may be the right approach to covering some stories, but it is only one approach. Other approaches offer their own strengths, which can either complement an impartial approach or, in some cases, be preferable to it. As Glasser put it, “objective reporting is more of a custom than a principle, more a habit of mind than a standard of performance.” If journalists or readers see objectivity as always preferable, that is because they have been trained to see it as such, not because of any inherent virtue in the approach.

I do see value in independence — at the magazine (*In These Times*) where I work, for instance, we report on social movements extensively. Yet, we generally don’t accept pieces about events that are written by the leader of the organization that organized it. In most instances, this would amount to providing free PR to these organizations or causes. And an outside, critical eye is a useful tool to have. But we do regularly take pieces from people involved in advocacy — for example, pieces on Israel/Palestine from members of the organization Jewish Voice for Peace. I would argue that the intimacy with the subject matter they have gained from being activists often improves their pieces.

## Deciding our role

Most of the journalism classmates with whom I've discussed the Hull and Nazario cases believe that Nazario did the right thing, but think that Hull should have driven the baby to the hospital.

Part of the reason for this assessment is the perceived imminence of the threat. Hull had been planning to assist the infant if the fever had persisted for much longer, but many of my journalist friends think she shouldn't have waited as long as she did — a feverish baby is no time to tempt fate.

On the other hand, while Enrique was presumably suffering as he struggled to find a phone, he was not close to death. But what constitutes "imminent danger?" Surely there are moral gradations between providing shelter to a fugitive slave on the Underground Railroad and lending a boy a phone, and even if we think the former is obligatory, then we must draw a line somewhere.

Obviously, it would be impractical, not to mention illegal (although so was the Underground Railroad) for Nazario to fund and organize Enrique's journey herself. But while lending Enrique a phone might not have made the difference between life and death, it also would have been a very easy way to offer help that would have made a big difference to him without significantly altering the story. This is, at least potentially, a case in which abandoning the conception of a journalist as simply a reporter or a fly-on-the-wall, would have been better.

Another critical difference between Hull's case and Nazario's is the age and capacity for reason of their subjects. The feverish baby had no capacity to reason, whereas Enrique, while still young, could understand why a reporter would choose not to intervene. Both Hull and Nazario explain the importance of laying down clear ground rules before starting to report, including explaining to the subjects one's role as an observer (if that is the role the reporter chooses to take). To a baby, such ground rules would mean nothing. Enrique, at least, could understand them and — insofar as a minor can — consent.

True to the spirit of this essay, let me now insert myself into the story. In college, I had been writing a story on Princeton University's primate labs when news of an abused monkey in a Princeton lab leaked. A friend from PETA (with which I had no formal affiliation) reached out to me, asking if I could write and circulate a petition around campus in response. For a moment I wasn't sure — I had intended my article to be predominantly third person, and if I started a petition, that would inevitably become part of the story.

My reason for wanting to write in the third person was not to adhere to policy. At the alternative weekly student paper where I wrote and edited, we didn't follow any particular

codes, and I had free rein in my writing style. Most of our pieces, including my own, included at least some first-person narrative. However, at that time I thought a third-person article would be taken more seriously and granted more respect by primate scientists — and, perhaps, it might also look nice on a grad school application.

But this friend had been helpful to me in the past, and given the docile state of animal advocacy on campus, I was worried no one else would do anything if I declined. So I ended up circulating a petition, meeting with lab administrators about potential reforms, and putting off the article until some closure had been achieved. One of the administrators proved very receptive to dialogue, but only the most minor of my proposed reforms were even partly adopted.

While this process changed the article's focus, it also offered me valuable insights into how advocacy works and how the university viewed its labs — insights that I would not have otherwise gained. By becoming involved in my topic I gained access to information that proved useful to my story. The administration hadn't wanted to talk to me when I was just a journalist; it wasn't until I submitted the petition that anyone agreed to meet — and even then, I was asked not to include the details of those meetings in my piece.

In the end, I believe my own intervention improved that article — and potentially, in some tiny and ludicrously insufficient way, also improved the lives of the monkeys, rodents, and fish at Princeton's labs, which had been my primary goal from the start. Had I not become involved, had I chosen to adhere to a specific set of guidelines for respectable, third-person investigative reporting, I believe I might have been sacrificing the monkeys on the altar of my journalism career. They, like the feverish baby, can't consent.

Ultimately, my own reporting (on both humans and nonhumans) *does* come with an advocacy mission, and I still think of myself as an activist. Perhaps starting a petition — let alone civil disobedience — might be too much to ask of reporters. But perhaps, subtle contributions like a ride to the hospital or loaning a phone need not threaten the integrity of a story. As journalist Nick Miroff put it, explaining in *The Washington Post* why he sometimes gives food or aid to people he reports on, arguments for total nonintervention “have never felt more hollow than when I'm in Haiti and someone is telling me they haven't eaten in two days.”

Hull writes, “We must stick to the basic framework, telling ourselves: ‘I am here to do a job.’” But whether we admit it or not, we, as reporters, are physically there. We are doing a job, yes, but we are also citizens and we have our own thoughts and feelings and our presence both consciously and unconsciously affects our subjects' behavior, no matter what we do. We are thoroughly enmeshed in complex social and ecological relationships. Thus, we have affected the story already, and if we can do vulnerable subjects some small favor, without compromising our independence or diminishing the social utility of our work, then maybe the basic framework is ready for an update.

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## Backstory

*The pen, we are often told, is mightier than the sword. But at FASPE, we talked about some of our journalism forebears who weren't particularly confident in the political power of the pen alone.*

*In our discussions of World War II-era journalists, several of the individuals whose careers we examined had blurred the line between their journalism and their advocacy. Some firmly tried to keep their biases out of their reporting; others continued to report while getting involved in political advocacy; and one left journalism altogether to dedicate himself to smuggling Jews out of Nazi-occupied France. Someone in our group suggested that, in some situations, there may be higher callings than journalism.*

*These examples stuck with me — I'd like to believe that if I were in a position to smuggle people to safety, but had to give up journalism to do so, I would give up journalism. Does this mean that if I believe some issue today demands similar urgency, that I should throw aside my pen and throw myself into direct action? Should I have quit my job to move to the Standing Rock encampments, for example, to combat the climate crisis and the dispossession of indigenous people?*

*At this point in time, I have decided that I am more useful to the climate movement as an editor for the progressive In These Times magazine than I would be as an activist at Standing Rock. (In fact, at In These Times I have edited multiple articles about Standing Rock and conducted a Q+A with an indigenous organizer, doing my part to help get the word out). But it does not make sense to me that the two have to be mutually exclusive.*

*The example I return to over and over again — although I'm far from an expert — is that of the abolitionist press of the early-to mid-1800s. Regarded at first as a fringe group, these writers and editors participated in the Underground Railroad and helped build a movement; this is the sort of model I'd like to follow in my own career.*

*I realize this is somewhat at odds with modern conceptions of objective journalism, and my advocacy bent has been the subject of many productive discussions both at FASPE and within journalism at large. In this piece, I wanted to explore it further, trying to determine where, why, and how to get involved in the stories we tell. Even if I haven't come up with definitive answers, I wanted to at least challenge the notion that we must remain as flies on the wall.*

DAYTON MARTINDALE









# Introduction to Selected Law Papers

BY THORIN TRITTER

EXECUTIVE DIRECTOR, FASPE

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The 2016 Law program was taught by Professor David Luban and Professor Judith Lichtenberg, both from Georgetown University, and included 12 Law Fellows from 11 different law schools. This was a wonderful, intelligent, and sharing group, whose members were open to engaging in meaningful discussions about their motivations, fears, and aspirations.

Over the course of the two-week trip, this group focused both on the large issues facing the legal profession and on the dilemmas faced by individual attorneys in their practices. Perhaps as important, the discussions often turned from how to make an ethical decision to how to enact one's decision, particularly as a young attorney working within the hierarchy of a law firm or government office.

After the conclusion of the trip, all 12 of the 2016 Law Fellows submitted papers that explored a contemporary legal ethics issue. The three papers that follow offer examples of those works and show the range of different approaches.

The first paper is by Elizabeth Jonas, who weaves together her reflections on the FASPE trip with an exploration of a lawyer's role today. Drawing on a comment from a FASPE Business Fellow who considered it a foregone conclusion that lawyers serve as the ethical compass for their corporate clients, Jonas considers the role of lawyers as moral guardians from several perspectives and across several different legal fields, eventually looking at whether lawyers should assist clients in tax avoidance and evasion.

The second piece is by Catherine Smith, who takes as a starting point the Justice Trial at Nuremberg and looks at the arguments used by Nazi judges to defend their actions in upholding and enforcing Nazi "racial pollution" laws. Smith then moves to more recent events as she explores whether any judge in U.S. history has been prosecuted for enforcing laws that similarly perpetuated racially discriminatory systems. Smith concludes with an argument about why principles from the Justice Trial are difficult to apply to the U.S. cases.

The final paper, by Jack Huerter, focuses on a far more recent event as he examines the lawsuit funded by Peter Thiel that forced Gawker Media into bankruptcy. Huerter explores the ethics of third-party litigation financing, tracing it back to the common law doctrine against "champerty" and questioning what guidance is provided by the current American Bar Association's Model Rules of Professional Conduct.

Together, these papers provide a glimpse into some of the discussions from the FASPE Law trip, and also demonstrate how these Fellows build connections between the history they learned and the issues facing attorneys today.

My heartfelt thanks and commendation, not only to these authors, but also to the entire FASPE Law group.

# A Reflection on Two FASPE Epiphanies

BY ELIZABETH J. JONAS

GEORGETOWN UNIVERSITY LAW CENTER, CLASS OF 2016

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FASPE was a life-changing experience for me because it helped me come to two important realizations. While immersed in intense conversations at the Topography of Terror Documentation Center in Berlin or at the site of the Wannsee Conference in Berlin's suburbs, I was in the right personal "place" to think about the legal profession and about myself as a soon-to-be lawyer. However, reflecting back on this experience four months later, the epiphanies I had then seem somewhat trite and obvious. Was I so enmeshed in my own personal experiences both pre-law school and as a law student prior to participating in FASPE that I needed to step away to see? Or did I need to step away to see because certain ideas are so embedded in our larger national consciousness?

My first FASPE epiphany was that people understand the place of law in society based on whether they trust or distrust the government. This realization came about when I was trying to figure out what was dividing the law group during our discussions. Disagreements often seemed to pivot around a fundamental principle. We fell roughly into two camps: those who fundamentally trust authority (i.e. federal/state/local government and law enforcement) and those who do not. I fell squarely into the camp of trusting authority based on my own professional and personal experiences. I found myself defending "the system." I had, after all, worked in my first job after college as a paralegal at the United States Department of Justice. There I worked harder than I had ever worked in my life and developed a thick skin. I sat in federal court and befriended prosecutors and FBI agents. And on a personal level, I grew up in a small town where I never had a reason to distrust the local police. They were eager to pull over speeders on old country roads, but I never feared for my life or was treated differently based on how I looked.

I came to find that this was not the life experience of many of my FASPE colleagues. Based on where they grew up or based on their personal or professional life experiences, some of my FASPE colleagues deeply mistrusted those in law enforcement who had abused authority in front of their eyes. Similarly, the federal government was an amorphous concept to them that seemed impersonal and foreign.

Add to this the fact of the prevailing (but detrimental) idea in law school that you pick one side or the other when it comes to law-enforcement: becoming a public defender or becoming a state or local prosecutor.

Below, I will seek to explore this pervasive distrust of government and parse out how this affects how clients, specifically business leaders, regard the law and lawyers.

My second FASPE epiphany was that lawyers should not shy away from acting as a moral/ethical compass for their business clients. I clearly recall a conversation I had with a group of FASPE Business Fellows after our second day at Auschwitz-Birkenau. We were eating lunch at the Center for Dialogue and Prayer in the sleepy town of Oswiecim when a Business Fellow commented that lawyers are hired to be the moral and ethical compasses of CEOs and corporations around the world. He claimed that business leaders would pursue the bottom line until a lawyer told them to stop. I remember being alarmed at the matter-of-fact way my colleague articulated this idea as if it were a point no longer open to discussion or negotiation. I remember thinking, “If that is true, where is the social responsibility of big business? And this would put lawyers into an unrealistic bind.”

Related to this is the distinction between the spirit and the letter of the law and whether lawyers have a duty to read the law liberally, i.e. according to its “spirit” when a literal reading of the law would benefit just the few. A good example is the current debate regarding the duty to pay federal income taxes. Is it a lawyer’s ethical or moral responsibility to interpret the tax code in the “spirit” of the law, according to which paying taxes is a duty to your country, or is finding loopholes in the code and assisting clients in paying as little as they can under the law indicative of business savvy and good lawyering? Further on in this piece, I will use this debate on interpreting tax law in order to unpack a lawyer’s moral obligation to society and how my first point — mistrust of government — factors into this question.

## Mistrust of Government and “The Law”

Since FASPE, I have been thinking about the premise that if you distrust government, you would find it more palatable to find loopholes so as to abandon the spirit and manipulate the letter of a law to reach a particular end. As I searched online, I discovered the interesting sociological phenomenon that Americans distrust government, but still want it to do a lot for them. According to a 2015 Pew Research Center Report, only 19% of interviewed Americans said they trusted the government always or most of the time.<sup>1</sup> Further, those polled trusted “typical Americans” and “business leaders” over elected

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<sup>1</sup> John Sides, “Americans Don’t Trust the Government. But They Still Want Government to Do A Lot,” *The Washington Post*, November 23, 2015, <https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/23/americans-dont-trust-government-but-they-still-want-government-to-do-a-lot/>.

officials.<sup>2</sup> Ironically, however, 94% thought the government should protect us against terrorism.<sup>3</sup>

Distrusting the government, yet still relying on it to keep you safe, are dichotomous ideas. But they co-exist in the American psyche. Internationally, we have seen how this dichotomous thinking can take hold in reaction to government corruption. During a recent visit to Sokoto, Nigeria, U.S. Secretary of State John Kerry called corruption a “root cause” of organized violence.<sup>4</sup> He went on to say that “[t]here is nothing more demoralizing, more destructive, more disempowering to a citizen than the belief that the system is rigged against them, the belief that the system is designed to fail them, and that people in positions of power ... are ‘crooks’—crooks who are embezzling the future of their own people.”<sup>5</sup> Perhaps then it can be said that the high water mark of disillusionment and distrust of one’s government is actual corruption, such as the giving and taking of bribes. A slightly less urgent problem is “political terrorism” — the idea that the system is rigged against you; an idea that pervades American politics today.

On the other hand, an unwavering commitment to “the system” creates a dangerous environment in which punishment for the sake of punishment, law for the sake of law, may flourish. Many have written about the danger of an over-reliance on government power. In his book, *Just Mercy: A Story of Justice and Redemption*, Bryan Stevenson, a lawyer and founder of the Equal Justice Initiative, writes that America is an “unprecedentedly harsh and punitive nation ... result[ing] in mass imprisonment that has no historical parallel.”<sup>6</sup> It is important to think about where lawyers fit in at either extreme.

## The Role of Lawyers in a System Where the Majority of Americans Mistrust the Government

What role do lawyers play in a country where the majority of Americans mistrust the government, but expect the government to protect them? Every law student studies the tension in the American Bar Association’s Model Rules of Professional Conduct between

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<sup>2</sup> Elissa Nunez, “New Report Outlines Deep Public Distrust of Federal Government,” NBC News, November 23, 2015, <http://www.nbcnews.com/politics/elections/new-report-outlines-skepticism-federal-government-n467366>.

<sup>3</sup> Sides, “Americans Don’t Trust the Government. But They Still Want Government to Do A Lot.”

<sup>4</sup> Sides, “Americans Don’t Trust the Government. But They Still Want Government to Do A Lot.”

<sup>5</sup> Richard L. Cassin, “John Kerry: Corruption Is ‘Root Cause’ of Terrorism,” FCPA Blog, August 25, 2016, 9:28AM, [http://www.fcpablog.com/blog/2016/8/25/john-kerry-corruption-is-root-cause-of-terrorism.html?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+fcablog%2FsLbh+%28The+FCPA+Blog%29](http://www.fcpablog.com/blog/2016/8/25/john-kerry-corruption-is-root-cause-of-terrorism.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+fcablog%2FsLbh+%28The+FCPA+Blog%29).

<sup>6</sup> Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* (New York: Spiegel & Grau 2014), 15. Stevenson writes that “[t]here are nearly six million people on probation or on parole” and “[o]ne in every fifteen people born in the United States in 2001 is expected to go to jail or prison; one in every three black male babies born in this century is expected to be incarcerated.”

Model Rule 1.3<sup>7</sup> (which calls for the diligent representation of one's client), on the one hand, and rules like Model Rule 3.3 (which discusses candor to the tribunal and opposing counsel) or Model Rule 2.1 (which encourages "straightforward advice expressing the lawyer's honest assessment" and counsels against calibrating one's advice according to how well it would be received), on the other hand.<sup>8</sup> This tension is amplified in a society where loyalty to the system/the government/practice of law is not always considered virtuous.

This dichotomy of mistrusting the government but still relying on government services has one of its fullest expressions in tax law and policy. The levying of taxes was, of course, written into the U.S. Constitution by the Founding Fathers.<sup>9</sup> The U.S. tax code is known for its complexity, loopholes, and exceptions. What creates an interesting dichotomy within tax law is the countervailing idea that, particularly because of its complexity, lawyers are encouraged to think of the tax code as something to be interpreted and analyzed. Led by the legal scholar Judge Learned Hand in the first half of the 20<sup>th</sup> century, jurists created a guiding principle in adjudicating tax issues so as to determine the most equitable outcome by looking at the substance of the outcome and intent rather than the form.<sup>10</sup> The Internal Revenue Service (IRS) states that the U.S. tax system is "based on the idea of voluntary compliance."<sup>11</sup> Perhaps, in order for taxes to be a successful source of government revenue, or at the very least to make logical sense, members of society must trust the government levying those taxes.

It is important to remember, however, that Judge Hand created his limiting principle because he was an advocate of "tax avoidance."<sup>12</sup> "Tax avoidance" and "tax evasion" are two well-known terms in tax law.<sup>13</sup> The IRS defines "tax avoidance" as "[a]n action taken to lessen tax liability and minimize after-tax income."<sup>14</sup> "Tax evasion," on the other hand, is "[t]he failure to pay or a deliberate underpayment of taxes."<sup>15</sup> Judge Hand believed that anyone may "arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes ... nobody owes any public duty to pay more than the law

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<sup>7</sup> American Bar Association, *Model Rules of Professional Conduct* (Chicago: ABA Publishing, 2013), 1.3, which states: "A lawyer shall act with reasonable diligence and promptness in representing a client."

<sup>8</sup> American Bar Association, *Model Rules*, 2.1, cmt. 1, which states: "A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

<sup>9</sup> See U.S. Const. amend. XVI, or U.S. Const. art. I, §2, cl. 3, or U.S. Const. art. I, §8, cl. 1.

<sup>10</sup> Henry Ordower, "The Culture of Tax Avoidance," *Saint Louis University Law Journal* 55 (2010): 51.

<sup>11</sup> Internal Revenue Service, "Worksheet Solutions: The Difference between Tax Avoidance and Tax Evasion," [https://apps.irs.gov/app/understandingTaxes/whys/thm01/les03/media/ws\\_ans\\_thm01\\_les03.pdf](https://apps.irs.gov/app/understandingTaxes/whys/thm01/les03/media/ws_ans_thm01_les03.pdf).

<sup>12</sup> Marvin A. Chirelstein, "Learned Hand's Contribution to the Law of Tax Avoidance," *Faculty Scholarship Series*, Yale University, Paper 4554, [http://digitalcommons.law.yale.edu/fss\\_papers/4554](http://digitalcommons.law.yale.edu/fss_papers/4554).

<sup>13</sup> Internal Revenue Service, "Worksheet Solutions: The Difference between Tax Avoidance and Tax Evasion."

<sup>14</sup> Internal Revenue Service, "Worksheet Solutions: The Difference between Tax Avoidance and Tax Evasion."

<sup>15</sup> Internal Revenue Service, "Worksheet Solutions: The Difference between Tax Avoidance and Tax Evasion."

demands.”<sup>16</sup> There is a tax culture in the U.S. that regards tax sheltering and avoidance as morally acceptable.<sup>17</sup> Legal scholars, such as Henry Ordower, suggest that this wasn’t always the case, but that perhaps it is a phenomenon introduced by younger lawyers who use textualism and the letter of the law to get their clients what they want.<sup>18</sup> By contrast, Oliver Wendell Holmes Jr., who was a Supreme Court Justice from 1902 to 1932, is frequently quoted as saying that “taxes are the price we pay for a civilized society.”<sup>19</sup> Under this view, taxes are fundamental to our government, and if the payment of taxes breaks down, so does our government, and the country is left spinning in the endless feedback of distrust for government, tax avoidance, and more distrust.

Against this backdrop of competing philosophies regarding the social responsibility to pay taxes, what obligation do lawyers have in advising their clients about their tax exposure? Do lawyers have a greater obligation to society than to their clients and therefore should they advise clients according to the spirit of the law, urging that what is technically legal under the tax code is not always ethical? Perhaps this is a more difficult question in the context of taxes because the subject matter has to do with numbers and money. Perhaps a dangerous line is drawn in our society between what is business and what is the law, which leads to the perception that gaming the tax code is “smart.” Is there a false distinction perpetuated in the media between business, on the one hand, and the law or the best interests of society, on the other?

I would suggest that perhaps lawyers *are* the appropriate middlemen between business clients looking to game the system and the best interests of society at large, and that lawyers should embrace this role rather than shun it. Businesses already understand that in court proceedings there is a give and take to reach a point of equilibrium that is just. Maybe discussions in private boardrooms should go the same way. Perhaps lawyers are another source of mediation between self-interest and society so that more individuals can trust government and the law. The ABA Model Rule 2.1’s comments section discusses the distinction between moral/ethical advice and legal advice and is a good starting point: “It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”<sup>20</sup>

There are, of course, other solutions that have been proposed to change the tax evasion culture such as a public information campaign which, as Ordower writes, should “balance the positive and negative, emphasizing the great benefits that tax collections fund —

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<sup>16</sup> Robert M. Howard, *Getting a Poor Return: Courts, Justice, and Taxes* (Albany: SUNY Press, 2009), 1–2.

<sup>17</sup> Ordower, 113–114.

<sup>18</sup> Ordower, 114 (citing Dennis J. Ventry, Jr., “Raising the Ethical Bar for Tax Lawyers: Why We Need Circular 230,” *Tax Notes* 111 (2006): 823, 825).

<sup>19</sup> Howard, 1–2.

<sup>20</sup> American Bar Association, *Model Rules*, 2.1.

education, police, fire, and military protection — and the negative of the relative-certainty of negative consequences from failing to report and pay.”<sup>21</sup> Even if this kind of collective thinking is productive, lawyers have an obligation both to their clients and to society as a whole to raise arguments that go beyond the text on the page — to be the intermediary between the text of the law and the spirit of the law when there is a gap between the two. In order for this to work, courts must agree that it is certainly not malpractice for lawyers to bring up the ethical or moral dimensions of a client’s tax liability-risk calculation. This will create some space for lawyers to feel that they can advocate for their clients in a holistic way and will help to foster institutional trust.

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<sup>21</sup> Ordower, 128.



# Exploring the Justice Trial of the Nuremberg Trials

BY CATHERINE SMITH

UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW, CLASS OF 2017

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In the wake of World War II, the Allies held the famous Nuremberg Trials, in which those who had participated in the Holocaust were prosecuted. One of these numerous trials was the Justice Trial, which was a case brought by United States authorities against 16 German judges and prosecutors for upholding and enforcing Nazi “racial pollution” laws.<sup>1</sup> At the end of the lengthy trial, four defendants were acquitted and ten were found guilty. Many of the jurists standing trial argued they were simply enforcing the laws. This paper explores whether any judge in U.S. history has been convicted for enforcing laws that similarly perpetuated racially discriminatory systems and under what circumstances it might be appropriate to prosecute such judges. This paper proceeds by giving background on the Justice Trial, examining certain U.S. cases that are arguably comparable to enforcing Nazi “racial pollution” laws, and exploring why principles from the Justice Trial are difficult to apply to these U.S. cases.

## The Justice Trial

German judges and prosecutors facilitated the sterilization and execution of thousands of Jews by enforcing laws promulgated by the Nazis. Many of these laws were directed specifically at Jews and/or Poles and gave them a harsher sentence simply by virtue of being Jewish or Polish. While 16 judges and prosecutors were tried in the Justice Trial, I will focus on two judges who received sentences of lifetime imprisonment for their actions during World War II: Rudolf Oeschey and Franz Schlegelberger.

### Rudolf Oeschey

Rudolf Oeschey was tried for his discriminatory rulings, specifically against Poles and Jews, while he was the Presiding Judge of the Special Court in Nuremberg.<sup>2</sup> According to those who worked with Oeschey, Oeschey made statements *before* trials began about the

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<sup>1</sup> *Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10: The Justice Case* (Washington D.C.: U.S. Government Printing Office, 1951), [hereinafter *The Justice Case*], 3–4.

<sup>2</sup> *The Justice Case*, 1159.

certainty that a defendant would be executed.<sup>3</sup> A prosecutor on the same court as Oeschey noted that Oeschey was the “most willing instrument of the Nazi terroristic justice.”<sup>4</sup> While there were apparently many examples of his “arbitrary character” in his decisions, the court in the Justice Trial focused on just a couple of his cases. In one of these cases, Oeschey sentenced two people to death for a minor altercation. A dispute broke out between a Polish woman and a German soldier, after which the woman threw a rock at the soldier while he was riding his bicycle.<sup>5</sup> Because a “great blood bath” would have allegedly ensued if the rock had hit the soldier, the woman was convicted of assault under “the law against violent criminals” and “offering resistance to the authority of a state.”<sup>6</sup> Additionally, the law stated that Poles must receive a harsher sentence for such crimes, namely the death penalty.<sup>7</sup> Furthermore, the Polish woman’s lover, a Ukrainian who had some involvement in the altercation, was sentenced to death as well (under the law requiring the death penalty for *Poles*).<sup>8</sup> The court at the Justice Trial found the following: “In this case, Oeschey, with evil intent, participated in the government-organized system for the racial persecution of Poles. This is also a case of such a perversion of the judicial process as to shock the conscience of mankind.”<sup>9</sup>

In Oeschey’s closing statement, he argued that he “obey[ed] the law to which [he] was subjected.”<sup>10</sup> He vehemently stated, “[I]t was a matter of conscience for me not to misuse the law in a criminal way, but to apply it in accordance with the will of the legislator, and to grant the offender a proper trial and a just verdict.”<sup>11</sup> Despite his attempt to frame his actions in a noble light, the court gave Oeschey a sentence of life in prison and, “in view of the sadistic attitude ... of the defendant,” did not mitigate the sentence.<sup>12</sup>

## Franz Schlegelberger

Franz Schlegelberger was a jurist in the Ministry of Justice. One example of the way he conducted his general practice is found in the so-called “egg-hoarding case.” In this case, a Jew was sentenced to two-and-a-half years in prison for “hoarding eggs.” Hitler was not pleased with this sentence, so he instructed that the Jew be sentenced to death. Four days later, Schlegelberger assured one of the Fuhrer’s officials that he had “handed over to the Gestapo for the purpose of execution the Jew Marcus Luftgas who had been sentenced to two and one-half years imprisonment.”<sup>13</sup>

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<sup>3</sup> *The Justice Case*, 1165.

<sup>4</sup> *The Justice Case*, 1165.

<sup>5</sup> *The Justice Case*, 1160.

<sup>6</sup> *The Justice Case*, 1160.

<sup>7</sup> *The Justice Case*, 1161.

<sup>8</sup> *The Justice Case*, 1161.

<sup>9</sup> *The Justice Case*, 1161.

<sup>10</sup> *The Justice Case*, 952.

<sup>11</sup> *The Justice Case*, 952.

<sup>12</sup> *The Justice Case*, 1170.

<sup>13</sup> *The Justice Case*, 1170.

Once again, the German judge in the case argued in his defense that he was merely faithfully applying the law. Schlegelberger quoted Pope Gregor VII in his closing statement: “I loved justice and hated arbitrariness; therefore, I die in exile.”<sup>14</sup> The court was not persuaded by this; it found Schlegelberger guilty, noting that not only did he commit crimes but also that by staying in office he lent credibility to the Nazi regime.

## U.S. Cases Perpetuating Racial Discrimination

There is nothing comparable to the Justice Trial in U.S. history. Only two federal judges have ever been criminally convicted and imprisoned for their actions while serving as judges, and neither crime related to the way these judges enforced the law. Therefore, these cases are not similar to the convictions of Oeschey, Schlegelberger, or other judges or prosecutors who participated in the Holocaust, because these U.S. convictions do not involve a judge enforcing a discriminatory law to reach an unjust result.

However, there are cases in which a judge in the U.S. upheld a law that perpetuated a racially discriminatory system, just as the court cases presented in the Justice Trial did. I will examine two such cases to determine whether it makes sense to criminally prosecute these judges who helped maintain slavery and a racially discriminatory system through their verdicts while on the bench. What these cases have in common with those presented at the Justice Trial is that the judges used the same rhetoric (as did the German judges) of faithfully applying the law to reach a wildly unjust result. One principle that emerges from the Justice Trial is that, while a judge’s role is certainly to apply the law, there might be certain extreme circumstances under which a judge should refuse to apply the law. When laws that are inherently unjust are systematically applied to the extreme detriment (specifically, the annihilation) of certain groups, a judge must consider those results. I will examine two U.S. cases — *State v. Mann* and *Brown v. State* — that perhaps fall under this category, and I will explore whether the judges in these cases should have been held accountable and prosecuted.<sup>15</sup>

In *State v. Mann*, a North Carolina case from 1829, the defendant had hired a slave, Lydia, and beat her. The issue before the Supreme Court of North Carolina was whether that “cruel and unreasonable battery on a slave, by the hirer, is indictable.” The facts of the beating are absent in the opinion. Justice Thomas Ruffin, who chose to author the opinion, “lamented” that a case such as this had to be decided and noted that he “would have gladly avoided this ungrateful question.” Nonetheless, in *expanding* upon precedent, Justice Ruffin found that it was his “imperative duty ... to recognize the full dominion of the owner over the slave.” He therefore held: “The power of the master must be absolute,

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<sup>14</sup> *The Justice Case*, 941.

<sup>15</sup> These two cases are state cases. The federalism issue this brings up is beyond the scope of this paper.

to render the submission of the slave perfect.” This absolute power included physical violence; thus, the defendant’s conviction was reversed.<sup>16</sup>

In *Brown v. State*, a 1935 Mississippi case, the Supreme Court of Mississippi upheld convictions against three black men for murder, even though their confessions had been coerced through torture. The sheriff and “others” went to the homes of the three men, beat them, arrested them for murder, and put them in jail. All three defendants denied the allegations until they were sufficiently tortured into confessing the murders. The dissent said of the beatings: “It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some mediaeval [sic] account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.” There was no question of fact as to whether the torture occurred. Yet, Justice Smith, who authored the majority opinion, upheld the convictions because no motion to exclude the confessions was made, even though the defendants’ counsel had objected. In defending his decision, Justice Smith stated:

The rules of procedure here applied are technical only in the sense that all such rules are, and what the appellants request is simply that they be excepted from the procedure heretofore uniformly applied to all litigants. This we cannot do. All litigants, of course, of every race or color, are equal at the bar of this court, and we would feel deeply humiliated if the contrary could be justly said.

Justice Smith frames the story in such a way that three men — who were repeatedly “hanged ... by a rope to the limb of a tree,” whipped, “laid over chairs and their backs were cut to pieces with a leather strap with buckles on it,” and told the torture would continue until they confessed — were seeking *exemption* from due process of law. He even cites precedent to support his position that he was just applying the law, even though “[n]othing herein said is intended to even remotely sanction the method by which these confessions were obtained.” Similar to Justice Ruffin, Justice Smith made a point of saying that while he did not condone the actions of the sheriff, he was bound to follow the law.<sup>17</sup>

## How Principles from the Justice Trial Inform U.S. Cases

All four of these judges — Oeschey, Schlegelberger, Ruffin, and Smith — appealed to the noble purpose of faithfully applying the law. What we learn from the Justice Trial, which, one should bear in mind, was a trial by U.S. authorities, is that there are at least some circumstances under which the right thing for a judge to do is to strike down laws that arbitrarily restrict liberty or to interpret those laws in a different way. Ruffin could have

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<sup>16</sup> *State v. Mann*, 13 N.C. 263 (1829).

<sup>17</sup> *Brown v. State*, 173 Miss. 542 (1935).

interpreted the law in a narrower way while still adhering to existing law, but instead chose to validate “cruel and unreasonable battery” toward slaves in order to render their complete submission to their masters. Smith could have ruled that a confession that only came as a result of torture could in no way be consistent with due process, as the Supreme Court of the United States ruled upon appeal. But these judges did not. Yet, neither was ever reprimanded for his opinion. The question this paper explores is: Is this right? In light of the fact that U.S. authorities prosecuted and imprisoned judges who perpetuated the Nazi goals of extermination of Jews and Poles, should judges like Ruffin and Smith have been prosecuted for perpetuating slavery and discrimination against blacks, respectively?

While the opinions of Ruffin and Smith perverted justice, imprisoning them for their opinions would have probably resulted in a weakening of the U.S. judiciary. Differences between the German and U.S. legal systems shed light on why this is so.<sup>18</sup> The first consideration that informs how these judges should be reprimanded (or not) for their actions is the availability of appellate review. In Nazi Germany, there was no chance for victims to appeal. Neither the Polish woman who was executed for throwing a rock nor the Jewish man who was executed for hoarding eggs, nor any of the thousands of Jews with similar stories, had the chance to appeal to a higher court. Oeschey, Schlegelberger, and other German judges had the final say in the fate of those on trial. By contrast, in the U.S., a state supreme court case may be appealed to a higher court if there is a constitutional violation.

In fact, *Brown v. State* was appealed to the Supreme Court of the United States and overturned. The defendants were granted a retrial, but took plea bargains rather than risk another trial, and they ended up serving from three to seven years in prison. While justice was not fully accomplished in this situation, there was at least an official acknowledgement by the Supreme Court of the United States that Justice Smith completely got it wrong.

Why this difference matters is that Justice Smith did not have the last word, whereas Oeschey and Schlegelberger did. The actions of the latter two judges led to the deaths of the defendants, killed via the weapon of the German courts. Killed for throwing a rock while being Polish. Killed for hoarding eggs while being Jewish. Doing nothing to make up for these atrocities would deeply offend our need as humans to make wrongs right. *Something* had to be done, and given that the judges were the ones who had given the death sentences, they were held accountable.

Deeply connected to the U.S. availability of appellate review is that the U.S. has a written Constitution, a code whose principles must be adhered to. This Constitution, rather than

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<sup>18</sup> The vast differences in German and U.S. history in general would shed light on this as well; however, that is beyond the scope of this paper.

any one branch of government or politician, is supreme. In contrast, in Nazi Germany, the judiciary ignored the Weimar Constitution and acted as if Adolf Hitler himself was the highest law that could be appealed to.<sup>19</sup> Judges redefined their ethical standards, placing the Fuhrer and the Reich above all else, including basic human rights that actually had been set forth in their Constitution.<sup>20</sup> This is in direct contrast to U.S. law, where an appeal to a higher law could be made.

The most important difference is that Nazi Germany did not have an independent judiciary, whereas an independent judiciary is fundamental to the U.S. legal system. The lack of an independent judiciary is, in part, what caused German judges to participate in the Holocaust. Many of the German judges, including Oeschey and Schlegelberger, were members of the Nazi Party. Additionally, Hitler ordered that he could personally intervene in any case before a court, which meant, in practice, that he could make any punishment more severe. In addition to these means of eliminating the separation between executive powers and the judiciary, Hitler also implemented a way to learn inside information about how judges conducted court. This lack of separation between the judicial and executive powers of government is what caused the judges tried in the Justice Trial, who might have already had sympathies for the Nazi goal of “purifying” the German blood, to be further influenced to “enforce” discriminatory laws that resulted in the murder of thousands of (mostly) Jews.

In the U.S., the independence of the judiciary is such an important part of our system of government that it is written into the U.S. Constitution.<sup>21</sup> Article III of the Constitution states that federal judges must be appointed by the President, their compensation may not decrease during their time in office, and they can only be removed from office by impeachment and conviction by Congress. This ensures that, although judges are appointed by the Executive, once on the bench, they do not make decisions out of fear of a decrease in salary or of removal for unpopular opinions. This is why the principles taken from the Justice Trial cannot easily be applied to U.S. cases; to have the threat of conviction for applying the law in a certain way would compromise an independent judiciary, which (as already stated) was part of the cause of the German judges’ complicity in the Nazi regime in the first place. While an independent judiciary alone was obviously not sufficient to prevent the verdicts delivered in cases such as *State v. Mann* and *Brown v. State*, an independent judiciary remains necessary. It is partly as a consequence of its independent judiciary and its adherence to the Constitution as the supreme law of the land, that the U.S. has, over time, also been able to overturn laws that have subjected a particular group of people, in this case African Americans, to discrimination and persecution.

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<sup>19</sup> See *The Nuremberg Trials: The Justice Trial*, <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/Alstoetter.htm>.

<sup>20</sup> *The Nuremberg Trials: The Justice Trial*.

<sup>21</sup> U.S. Const. art. III.

Instead of focusing on criminal prosecution of judges whose rulings may be legal but not ethical, perhaps we should focus from the outset on appointing judges who have the demonstrated character and skills to resist applying the law in an unjust manner. Alexander Hamilton emphasized the importance of having qualified judges in Federalist Paper Number 78:

To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . [T]he records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. *Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.*<sup>22</sup>

## Conclusion

Given that the U.S. legal system provides for the opportunity to appeal to a written Constitution and that the Constitution provides for an independent judiciary, I would argue that prosecuting judges for upholding unethical laws would place the independence of the judiciary at risk. Ironically, this, in turn, could lead to an erosion of justice over time, making it more likely that judges would perpetrate injustice in future verdicts. Instead, I believe, the emphasis should be on appointing judges who have the “sufficient skill” and “requisite integrity” to not apply the law in an unjust manner.

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<sup>22</sup> Alexander Hamilton, “No. 78: The Judiciary Department,” in Clinton Rossiter, ed., *The Federalist Papers* (New York: Mentor, 1999), 463–71, (emphasis added).

# Was the Peter Thiel Funded Lawsuit Against Gawker Ethical?

BY JACK HUERTER

UNIVERSITY OF WISCONSIN LAW SCHOOL, CLASS OF 2017

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In March of 2016, a Florida jury handed down a unanimous verdict against Gawker Media for invasion of privacy, unlawful publication of private facts, violation of the common law right of publicity, intentional infliction of emotional distress, and violation of Florida's Security of Communications Act.<sup>1</sup> In this case, former professional wrestler Terry Bollea — better known as Hulk Hogan — had sued Gawker Media for publishing a video of him having sex with a woman that was recorded without his knowledge. Bollea argued, among other things, that Gawker violated his right to privacy by posting the video online and that this caused him considerable suffering.<sup>2</sup> Gawker countered that, given Bollea's celebrity and previous public statements about his sex life, the video was a matter of legitimate public concern and thus its publication was protected speech under the First Amendment.<sup>3</sup> After a two-week trial, the jury ultimately determined that the video was not a legitimate matter of public concern and that Gawker had improperly and intentionally harmed Bollea by invading his privacy. The jury entered a \$140 million judgment<sup>4</sup> against Gawker Media, a crushing sum that was so large that it caused the company to file for bankruptcy.<sup>5</sup>

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<sup>1</sup> "Entry of Verdict," *Bollea v. Gawker Media*, Case No. 12012447 CI-011, March 18, 2016 (Fla. Cir. Ct.). All court documents in *Bollea v. Gawker* that are referenced in this article are available at <http://hpc.pinellasclerk.org/hpcdisplay/default.cshtml?page=1>.

<sup>2</sup> "Amended Complaint," *Bollea v. Gawker Media*, Case No. 12012447 CI-011, December 28, 2012 (Fla. Cir. Ct.).

<sup>3</sup> "Def's Mot. for Summary Judgment," *Bollea v. Gawker Media*, Case No. 12012447 CI-011, May 5, 2015 (Fla. Cir. Ct.); see also "Def.'s Mot. for Judgment Notwithstanding Verdict", Case No. 12012447 CI-011, May 5, 2015 (Fla. Cir. Ct.), 8.

<sup>4</sup> On March 18, 2016, the jury awarded Terry Bollea \$115 million in damages; see Matt Drange, "Peter Thiel's War on Gawker: A Timeline," *Forbes Online*, June 21, 2016, <http://www.forbes.com/sites/mattdrange/2016/06/21/peter-thiels-war-on-gawker-a-timeline/#7d57c0ca7e80>. At a subsequent hearing, the jury later awarded an additional \$25 million in punitive damages bringing the total judgment awarded to \$140 million; see Nick Madagan, "Jury Tacks on \$25 Million to Gawker's Bill in Hulk Hogan Case," *The New York Times*, March 21, 2016, <http://www.nytimes.com/2016/03/22/business/media/hulk-hogan-damages-25-million-gawker-case.html>.

<sup>5</sup> Sydney Ember, "Gawker, Filing for Bankruptcy after Hulk Hogan Suit, Is for Sale," *The New York Times*, June 10, 2016, <http://www.nytimes.com/2016/06/11/business/media/gawker-bankruptcy-sale.html>.



After the entry of judgment, and on the back end of nearly four years of legal proceedings, *Forbes* magazine uncovered that billionaire tech entrepreneur Peter Thiel had financed Bollea's costly lawsuit, fronting the former wrestler roughly \$10 million to pay the legal fees in his drawn out proceedings against Gawker Media.<sup>6</sup> By his own admission, Peter Thiel was motivated to fund the lawsuit due to the personal enmity he felt toward Gawker Media, stemming from a 2007 blog post it had published that outed Thiel as a gay man.<sup>7</sup> At some point following his outing, and after Gawker had published a number of other damaging stories about the personal lives of public figures, Thiel explained that he had funded a team of lawyers to "find and help 'victims' of the company's coverage" to bring lawsuits against Gawker.<sup>8</sup> In other words, Thiel sought out specific opportunities to fund lawsuits against Gawker to bring the company down and, in the end, succeeded in his endeavor.<sup>9</sup>

The recent revelations about Peter Thiel's involvement in funding lawsuits against Gawker have raised ethical questions about alternative litigation financing, and specifically, about the role of third-party funders. American court rooms have seen a dramatic increase in alternatively financed litigation in recent years,<sup>10</sup> to such an extent, in fact, that the American Bar Association (ABA) Committee on Ethics 20/20 has undertaken a study of the ethical implications of the issue.<sup>11</sup> This paper will proceed by giving an overview of the alternative litigation finance industry, a summary of the relevant ethical rules and doctrines that come into play with alternative litigation finance, and ultimately will provide an analysis of whether the attorney that tried the Peter-Thiel-financed lawsuit against Gawker acted ethically.

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<sup>6</sup> Ryan Mac, "This Silicon Valley Billionaire Has Been Secretly Funding Hulk Hogan's Lawsuits Against Gawker," *Forbes Online*, May 24, 2016, <http://www.forbes.com/sites/ryanmac/2016/05/24/this-silicon-valley-billionaire-has-been-secretly-funding-hulk-hogans-lawsuits-against-gawker/#6ac2d0ee7805>; see also Andrew Ross Sorkin, "Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker," *The New York Times*, May 25, 2016, <http://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html>.

<sup>7</sup> Peter Thiel, "The Online Privacy Debate Won't End with Gawker," *The New York Times*, August 15, 2016, <http://www.nytimes.com/2016/08/16/opinion/peter-thiel-the-online-privacy-debate-wont-end-with-gawker.html>.

<sup>8</sup> Sorkin, "Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker."

<sup>9</sup> Peter Thiel has not explicitly stated that his goal in funding litigation was to bankrupt Gawker, but has implied in a recent interview that this was his goal. He specifically explained that his goal in funding suits against Gawker was to deter the company from continuing its controversial journalistic tactics; see Sorkin, "Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker."

<sup>10</sup> Carol Langford, "Betting on the Client: Alternative Litigation Funding Is an Ethically Risky Proposition for Attorneys and Clients," *University of San Francisco Law Review* 49 (2015): 237, 239 (Langford notes that alternative litigation finance "is booming, and even investment funds are becoming involved in this practice."). See also Jennifer Anglim Kreder and Benjamin A. Bauer, "Litigation Finance Ethics: Paying Interest," *Journal of the Professional Lawyer* 1 (2013): 1-36.

<sup>11</sup> American Bar Association Commission on Ethics 20/20, *White Paper on Alternative Litigation Finance*, (October 2011), 1; [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111019\\_draft\\_alf\\_white\\_paper\\_posting.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf).

## Alternative Litigation Finance

Alternative litigation finance refers to the funding of litigation activities by third parties, meaning “entities other than the parties themselves, their counsel, or ... an indemnitor or a liability insurer.”<sup>12</sup> In alternative litigation finance arrangements, the funder of litigation will typically agree to pay the legal costs or living expenses incurred by the litigant in exchange for an assignment of part of the interest in the proceeds from the cause of action.<sup>13</sup> Such arrangements can be attractive to potential litigants. Litigants in consumer cases<sup>14</sup> are often able to obtain non-recourse loans (loans that are secured by collateral, usually in the form of property) to finance their lawsuits, meaning that the litigant need not repay the loan unless she recovers a judgment in the lawsuit.<sup>15</sup> Litigants in commercial cases<sup>16</sup> are typically able to secure funding to cover legal costs in exchange for an investment in the litigation outcome, which in large commercial disputes can be quite large.<sup>17</sup> Even law firms themselves are able to obtain funding from litigation financiers, enabling them to obtain capital that may be more difficult to obtain from a generic commercial lender.<sup>18</sup> Under all these circumstances, the financier limits the financial downside to the litigant by covering some or all of the legal fees that the litigant may otherwise incur in pursuing a case. Litigation financiers also stand to benefit considerably from their investment. A typical litigation finance agreement will enable the financier to recover the sums lent to the litigant if the case is successful, while also recovering a portion of the judgment award that exceeds the amount of funds lent to the litigant.<sup>19</sup>

## Ethical Considerations for Lawyers in Alternative Litigation Finance

Over time, ethical rules and common law doctrines have evolved to sanction third party financing of litigation. In an earlier era, the common law doctrine against “champerty” — an agreement in which a person with no previous interest in a lawsuit finances it with a view to sharing the disputed property if the suit succeeds — prohibited certain third parties from financing lawsuits.<sup>20</sup> More specifically, laws against champerty provided a remedy for circumstances in which “[a]n agreement [is made] between an officious

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<sup>12</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 1.

<sup>13</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 1.

<sup>14</sup> The term “consumer cases” refers to lawsuits in which an individual plaintiff seeks recovery from a defendant that may result in a monetary judgment. Steven Garber, *Alternative Litigation Financing in the United States*, (Rand Corporation, 2010), 1.

<sup>15</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 5-6.

<sup>16</sup> The term “commercial case” refers to business to business lawsuits. See Garber, 1.

<sup>17</sup> Litigation financiers in commercial cases routinely lend up to \$15 million to corporate litigants on cases valued at \$100 million or more. See Jason Lyon, “Revolution in Progress: Third-Party Funding of American Litigation,” *UCLA Law Review* 58 (2010): 571, 574.

<sup>18</sup> Garber, 13.

<sup>19</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 7.

<sup>20</sup> Langford, 237.

intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds.”<sup>21</sup> The rationale for this common law doctrine was to prevent fraudulent lawsuits by limiting the possibility that wealthy persons could use the court system for personal and improper ends.<sup>22</sup> A key focus of the doctrine was to prevent frivolous lawsuits advancing baseless legal theories.<sup>23</sup> In the present day, numerous ethical and jurisprudential doctrines have taken root to prevent frivolous litigation — such as Rule 11 of the Federal Rules of Civil Procedure and the doctrines of abuse of process, malicious prosecution, and wrongful initiation of litigation.<sup>24</sup> With these new approaches came a trend against the usefulness and applicability of champerty defenses and remedies. To date, over half of jurisdictions in the United States now permit champerty and, in those jurisdictions where the common law doctrine of champerty remains in effect, reliance on the doctrine has fallen out of favor.<sup>25</sup> Only a “paucity of modern cases” have weighed champerty claims lodged by a litigant against a counterparty.<sup>26</sup>

Modern courts are no longer skeptical of the legitimacy of third party financed litigation. The trend towards third party financed litigation began with the contingency model of litigation — in which an attorney essentially lends the time value of his services to the client in exchange for an agreed upon share of the proceeds of litigation — and has since evolved to take many forms.<sup>27</sup> The different types of alternative litigation finance arrangements may raise various ethical issues for lawyers to navigate. As the ABA has noted, “it is difficult to generalize about the ethical issues for lawyers associated with alternative litigation finance across the many differences in transaction terms, market conditions, relative bargaining power of the parties to the transaction and type of legal services being financed.”<sup>28</sup> However, despite the difficulty in making broad-based generalizations about specific cases, there are a number of general ethical themes that run through all types of cases funded by third parties.

## Conflict of Interest and the Duty of Loyalty to the Client

The ABA's Model Rules of Professional Conduct direct lawyers to refrain from representing a client if doing so would involve a conflict of interest.<sup>29</sup> Model Rule 1.7(a)(2)

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<sup>21</sup> Bryan A. Garner, ed., *Black's Law Dictionary*, 10<sup>th</sup> Edition (New York: Thomson West, 2014), 279.

<sup>22</sup> Langford, 237–38. The doctrine was necessary because, in the past, “[b]arons abused the law to their own ends and ... bribery, corruption, and intimidation of judges and justices of the peace [was] widespread,” Damian Reichel, “The Law of Maintenance and Champerty and the Assignment of Choses in Action,” Note, *Sydney Law Review* 10 (1983), 166. Wealthy persons would “buy up claims, and, by means of their exalted and influential positions, overawe the courts, secure unjust and unmerited judgments, and oppress those against whom their anger might be directed,” *Casserleigh v. Wood*, 59 P. 1024, 1026 (Colo. Ct. App. 1900).

<sup>23</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 9.

<sup>24</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 9.

<sup>25</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 11.

<sup>26</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 11.

<sup>27</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 10.

<sup>28</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 3.

<sup>29</sup> American Bar Association, *Model Rules of Professional Conduct* (Chicago: ABA Publishing, 2013), 1.7.

specifically provides that a conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to ... a third person.”<sup>30</sup> The ABA has further explained that a conflict of interest under Model Rule 1.7(a)(2) may arise if a lawyer has a relationship with a litigation financier that creates a “financial interest for the lawyer that may interfere with his or her obligation to provide impartial, unbiased advice to the client.”<sup>31</sup> From these rules, it follows that an ethical attorney must take care to prevent a client’s financial interest in the outcome of litigation from conflicting with any financial interest the attorney may have in obtaining third party financing. In alternative litigation finance arrangements, such a conflict may arise if the attorney obtains a referral fee from the litigation financier — which may therefore incentivize an attorney to advise a client to obtain this outside financing.<sup>32</sup> An attorney may also face a conflict of interest in negotiating a contract between a client and a litigation financier, because the terms of the contract may have financial consequences for the attorney. Therefore, an ethical attorney should avoid negotiating the terms of a loan from a litigation financier to a client if doing so would pit her interests against the interests of a client. This specific conflict of interest may arise in determining the order and structure of payments made from a successful case to the financier and attorney.

## Duty of Candor

As the ABA has noted, a litigation financier’s involvement in a lawsuit has the potential to interfere with the lawyer’s exercise of “candid, objective independent judgment on behalf of the client.”<sup>33</sup> In any lawsuit, a lawyer has the duty to exercise independent professional judgment and render candid advice to the client, and that duty cannot be adulterated by the presence of additional third parties interested in the outcome of a lawsuit.<sup>34</sup> However, in alternative litigation financing arrangements, litigation financiers may seek to protect their investment by exercising some control over a lawsuit by encouraging particular litigation strategies or influencing whether to accept an offer of settlement.<sup>35</sup>

When the interests of the litigation financier and the client depart, the exertion of influence by the litigation financier can be problematic and may present an ethical dilemma for the attorney. In third party financed litigation, the principal goal of a litigation financier will typically be to maximize the settlement size or judgment awarded to the client, thus maximizing the profit they earn on their investment. However, maximizing the size of an award is not necessarily the primary goal of the client. A client may be content to abandon the potential for a more sizeable judgment when an acceptable offer of settlement is on the table, or he or she may be most interested in seeking non-

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<sup>30</sup> American Bar Association, *Model Rules*, 1.7(a)(2).

<sup>31</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 17.

<sup>32</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 17-18.

<sup>33</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 22.

<sup>34</sup> American Bar Association, *Model Rules*, 2.1.

<sup>35</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 22.

pecuniary concessions such as an admission of wrongdoing or a commitment to address wrongful behavior. In those circumstances, an attorney must resolve to provide candid, objective, independent judgment to the client, and not up-sell the benefits of the preferred strategy of the litigation financier. This ethical dilemma may be especially pronounced in circumstances in which an attorney has an ongoing relationship with the litigation financier.

## Duty of Confidentiality and Attorney Client Privilege

When an attorney represents a client, communications between the attorney and the client about the subject matter of litigation are privileged.<sup>36</sup> This means that an attorney must not disclose information relating to the representation of a client without the client's informed consent, and he or she must exercise reasonable care to ensure that privileged information and work products are not inadvertently disclosed to outside parties.<sup>37</sup>

Litigation finance agreements complicate the attorney's duty to prevent the disclosure of otherwise confidential information. In a typical circumstance, litigation financiers require a would-be plaintiff and her attorney to share information with them regarding a potential case prior to extending financing for a lawsuit.<sup>38</sup> Further, many litigation finance agreements give the litigation financier the right to inspect all documents prepared by the attorney representing the borrower.<sup>39</sup> Under normal circumstances, an attorney would not be at liberty to share information regarding a client's case with an outside party. However, a client may grant a waiver of confidentiality and attorney-client privilege to a financier as a condition of the lending agreement, thus enabling an attorney to share requested information with a financier. Under those circumstances, it is necessary that the attorney ensure that the client gives informed consent to the waiver. Doing so requires the attorney to communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."<sup>40</sup>

## The Gawker Case

Peter Thiel funded Bollea's lawsuit against Gawker for an arguably improper purpose; he had a personal vendetta against the company and sought to prevent the company from publishing further stories that he found to be unfair and distasteful about the personal lives of others. Peter Thiel's personal basis for funding the litigation provides a rare occasion to consider the applicability of the doctrine of champerty to his role in the litigation. In Florida, where the case was litigated, a limited form of common law doctrine

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<sup>36</sup> See generally American Bar Association, *Model Rules*, 1.6.

<sup>37</sup> American Bar Association, *Model Rules*, 1.6(a); and American Bar Association, *White Paper on Alternative Litigation Finance*, 31.

<sup>38</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 30.

<sup>39</sup> American Bar Association, *White Paper on Alternative Litigation Finance*, 30.

<sup>40</sup> American Bar Association, *Model Rules*, 1.0(e).

of champerty remains in effect. Specifically, Florida law defines champerty as “a bargain by a champertor with a plaintiff or defendant for a portion of the matter involved in a suit in case of a successful termination of the action, which the champertor undertakes to maintain or carry on at his own expense.”<sup>41</sup> Further, Florida law requires a showing that the champertor “officiously intermeddled” with a lawsuit, which occurs when a person offers “unnecessary and unwanted advice or services” that are “meddlesome, especially in a highhanded or overbearing way.”<sup>42</sup> Put simply, champerty claims are an available remedy for persons on the losing end of a lawsuit that was financed by a third party that drummed up the lawsuit. Therefore, for Peter Thiel to be hypothetically liable to Gawker Media for champerty, Gawker must show that Peter Thiel officiously intermeddled with the dispute between Bollea and Gawker Media to initiate the lawsuit.

An additional consideration relevant to the applicability of champerty in the Peter-Thiel-funded lawsuit against Gawker is whether the suit pursued a meritorious claim. The champerty doctrine is justified as a means to prevent frivolous litigation, by limiting the opportunity for deep-pocketed persons to hassle a defendant with a frivolous suit occasioned by another person’s interactions with a defendant. Here, as the ultimate outcome indicates, Bollea had a meritorious claim against Gawker. Gawker Media published a damaging video of Bollea without his permission, and given Gawker’s transgression, Bollea had a legitimate basis for obtaining what he was entitled to under the law. Because Bollea had a legitimate legal basis for his lawsuit, a court would likely be dissuaded from considering a hypothetical champerty claim made by Gawker Media because such a claim would not conform to the underlying purpose of the doctrine — to prevent frivolous litigation.

Based on media reports of the timeline of Peter Thiel’s involvement in the lawsuit, it does not appear that Peter Thiel could have officiously meddled in the legal proceedings brought by Bollea and thus did not commit champerty. On October 4, 2012, Gawker published the salacious video of Bollea and within 24 hours, Bollea’s personal attorney sent a demand letter to Gawker to remove the video from its website.<sup>43</sup> When Gawker Media declined to remove the video from its website, Bollea hired additional attorneys to prepare a lawsuit.<sup>44</sup> Within two weeks of the incident, Bollea filed a complaint in a Florida court against the persons whom he believed leaked the photo to Gawker Media.<sup>45</sup> A few months later, Bollea filed an amended complaint adding Gawker Media as a defendant.<sup>46</sup> As indicated by the timeline, Bollea promptly and aggressively pursued legal action against Gawker Media and others involved in posting the video online. Absent additional

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<sup>41</sup> *Kraft v. Mason*, 668, So. 2d 679, 683 (Fla. Dist. Ct. App. 1996).

<sup>42</sup> *Kraft v. Mason*, 682, which states that “the few cases in Florida on this subject support the more modern-day approach that officious intermeddling is a necessary element of champerty.”

<sup>43</sup> Drange, “Peter Thiel’s War on Gawker: A Timeline.”

<sup>44</sup> Drange, “Peter Thiel’s War on Gawker: A Timeline.”

<sup>45</sup> “Complaint,” *Bollea v. Gawker Media*, Case No. 12012447CI-011, Oct. 15, 2012 (Fla. Cir. Ct.).

<sup>46</sup> “Amended Complaint,” *Bollea v. Gawker Media*, Case No. 12012447CI-011, Dec. 28, 2012 (Fla. Cir. Ct.).

information, a legitimate claim that Peter Thiel officiously meddled in the suit does not exist. Bollea acted on his own to assert his rights in court and without prodding by a third-party financier.

With regard to the attorney's conduct in the case, a legal ethics analysis of the Peter-Thiel-funded Gawker case is particularly difficult given the few facts that are known about the structure of the financial arrangement that Peter Thiel entered into to fund the lawsuit. Depending on the structure of the arrangement, different ethical concerns would have come into play based on the different motivations of the actors involved and the various contractual terms that were agreed to by the relevant parties. Regardless of the structure of the arrangement, there is no evidence that the attorney acted unethically by breaching his duty of loyalty, duty of candor, or duty of confidentiality. In the end, Bollea's attorney obtained a very large judgment in Bollea's favor, which indicates that his litigation strategy proved effective and was therefore in the client's best interests. Further, news coverage of the lawsuit does not indicate that an offer of settlement was made by Gawker to resolve the lawsuit, which is a scenario that could have given rise to a conflict of interest between Bollea and his financier. Finally, with respect to the duty of confidentiality, the facts available about the lawsuit suggest that a lending arrangement was freely entered into between Thiel and Bollea, or in the alternative, between Thiel and Bollea's attorney. Such an agreement would typically provide for a certain degree of information sharing, and no evidence indicates that the attorney breached that agreement in communications with Peter Thiel.

Based on the facts presented here, some may be surprised to learn that the lawsuit was, in fact, ethical. For many, the optics surrounding the lawsuit are difficult to stomach. A billionaire tech entrepreneur with an axe to grind opportunistically funded another person's lawsuit against a media company, providing the billionaire with a vehicle to destroy the company. This version of the story gives the impression that a wealthy individual may access the courts as a third-party funder to exact retribution against media outlets for unfavorable coverage. While this concern is understandable, an even more important consideration must be placed front and center: Gawker Media broke the law by publishing a hurtful and damaging video that invaded a person's privacy, and they did so in such a significant manner that a jury awarded record damages. No amount of funding can change the substantive law at play in litigation. For a third-party funder to successfully obtain a judgment against an adversary, the adversary must have actually broken the law. This significant limitation on the availability of enmity-driven third-party litigation should assuage some of the concerns raised by the success of the Peter-Thiel-funded lawsuit.









# Introduction to Selected Medical Papers

BY THORIN TRITTER

EXECUTIVE DIRECTOR, FASPE

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FASPE's 2016 Medical program was co-led by Dr. Sara Goldkind, formerly the Senior Bioethicist at the Food and Drug Administration, and Dr. Jeffrey Botkin, a Professor of Pediatrics and the Chief of the Division of Medical Ethics and Humanities in the Department of Internal Medicine at the University of Utah School of Medicine. Under their leadership, a group of 14 strikingly intelligent and caring medical students from 13 different schools engaged in a series of discussions and debates about specific ethical challenges faced by individual physicians and the broader ethical dilemmas confronting the medical profession overall.

The starting point for these discussions was the frightening fact that Nazi physicians were neither evil monsters nor a crazed minority, but had been trained in a system with established ethical guidelines that marked German medicine as a leader of the civilized world. If the Nazi physicians could lose their professional moorings, how can physicians today avoid the same risk? This question was at the heart of many of the FASPE Medical discussions.

The selected essays that follow explore some of the questions raised during the trip in greater detail and from contemporary perspectives. They also represent the high caliber of students who are attracted to the experiential learning that FASPE Medical offers.

The first essay is by Jason Han, who noted the apparent ease with which Germans embraced the dehumanization policies of the Nazis, leading him to consider the potentials for dehumanization in the operating room where he is training. With this as his starting point, Han goes on to consider the dangers inherent in the tendency to focus on technical mastery in modern medicine, where surgeons run the risk of thinking solely about how they operate rather than why they are operating or who they are operating on.

The second essay is written by Priscilla Wang, who also draws from her medical training, but focuses on the duty-hour policy in medical schools. While making clear she has no desire to equate the two, Wang argues that there are concerning similarities between the enabling beliefs of the medical profession in Nazi Germany and the assertions and rationales used by the modern-day American medical profession to justify the treatment of medical trainees.

Finally, Ben Yu writes about a particular case that made him question a physician's ability to assess the quality of life for some patients contemplating suicide. For a patient who is

suffering from such a constant level of pain that he can only see relief through death, should a physician's sole goal be to save life? Yu points out the lack of objective data when it comes to many psychiatric ailments and questions whether these psychiatric patients should be treated in the same manner as other patients who can take medication to relieve their pain.

On behalf of FASPE, I am grateful for having had the privilege to interact with such an inquisitive, energetic, and deep-thinking group of medical students; and thank the faculty for having enriched this journey for us all.

# A Procedure Resides in Its Ethics Behavior in the Operating Room

BY JASON HAN

UNIVERSITY OF PENNSYLVANIA PERELMAN SCHOOL OF MEDICINE,  
CLASS OF 2017

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The field of surgery is rich with bioethical considerations because surgery is a universally dramatic and intrusive experience. Even the most thick-skinned person is rendered vulnerable as everything from personal belongings to consciousness is stripped away on the way to the operating table. In the ensuing hours, while the patient is under anesthesia, there is the potential for both miracles and tragedies. The diseased tissue is carefully resected, after which sutures are sewn to bring the bleeding edges of the healthy tissue back together, and this cycle of destruction and reconstruction repeats itself until finally the blade is removed, the skin is sealed, and the patient awakens into a body that has been irreversibly altered, for better or worse. It literally is a life-altering experience.

In this light, the operating room (OR) is far from sterile and has a tremendous potential to become the frontier for novel and creative ethical developments — as well as the scene of ethical failings. Aware of the ethical dangers, the American College of Surgeons issued its *Statement of Principles Underlying Perioperative Responsibility* in 1996 and issued an updated version in 2016. This document outlines topics such as informed consent, disclosure of therapeutic options and errors, conflicts of interest, and follow-up care.<sup>1</sup> While the document also explicitly states, “Be sensitive and respectful of patients, understanding their vulnerability during the *perioperative* period,” there is a paucity of other literature that deals with matters taking place *inside* the OR. Partly this is due to the macabre subject matter. Although people readily discuss clinical issues, such as informed consent and admitting error, they are generally more squeamish about discussing surgical concepts. The public perception of the OR is also limited and skewed by the media — the surgeon with his (or her) imperturbable gaze, constantly performing heroic, brilliant maneuvers as blood pools from invisible or unreachable sources. This simplified portrayal often stands in the way of understanding just how behaviorally complex and dynamic the OR can be.

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<sup>1</sup> American College of Surgeons, “Statement on Principles Underlying Perioperative Responsibility,” *Bulletin of the American College of Surgeons* 81 (1996): 39-40.

Moreover, the OR is an autonomous and private space. It requires strict access privileges to enter. The only non-staff person in the room, the patient, is under anesthesia for the most part. No photo, video, or narration of the case is allowed to leave the room to protect the patient's rights to health privacy. And even if these were to be released, the layperson lacks the specialized knowledge to understand them. Lastly, and perhaps most important, the rituals and routines of surgery are often taught and accepted at face value without scrutiny or reformulation. Even some of the more invasive or distasteful aspects of surgery may be justified as being necessary for success.

Why do we need a strong perioperative code-of-ethics? Of course, as with any field in medicine, it is in the interest of improving patient care. But what is unique about surgery is that it is procedure-driven, and no procedure is inherently ethical or unethical. Rather, the true value of a procedure relies entirely on what meaning or purpose caregivers ascribe to it. It can be elevated into a healing art, or transformed into a tool of humiliation or harm. One need not look far back in history to find examples. In the weeks prior to starting my rotations in cardiac surgery as a fourth year medical student, I had stood at the entrance of the Auschwitz memorial retracing the steps of the Nazi apparatus as a Fellow with the Fellowship at Auschwitz for the Study of Professional Ethics. We learned about the mechanism and autonomy of Auschwitz, shielded from outside interference. We walked along the train tracks where over a million Jews, Sinti, homosexuals, the handicapped, and prisoners of war had arrived. Here, they were subjected to countless dehumanizing procedures, some of which originated outside the camps for use in medical treatments, but used by the Nazis as a tool for genocide.

Of course there are significant differences between the actions in Auschwitz and those that take place in an operating room. I do not mean to suggest an equivalency between the two. Most clearly, the goal of surgery is to cure, not kill. Still, the historical example of the Holocaust spurs us to think about how procedures without an ethical framework are capable of harm just as much as good. Modern surgery relies on the ethical ideal that surgeons "do no harm," but that is a slim reed to rely on. Using this historical example, this paper aims to describe how procedures that are not guided by an ethical framework are capable of harm just as much as good, and offers perioperative considerations that ought to supplement the ACS *Statement of Principles* in surgery. Specifically, it addresses three fundamental components of modern surgery that have the potential to cause unintended harm: 1) the sterile positioning and preparation methods; 2) the development of and reliance on muscle memory; and 3) the use of anesthesia during procedures.

## Preparation and Positioning

Most people believe that an operation begins at first incision. For the surgeon, this may be true. For the patient, however, the automatic and unvaried sequence of events that comprise the operation begins immediately after entering the OR. The patient is first

asked to identify himself and the operation that he will be having. Then he is asked to lie down on the operating table, which marks his final conscious act before being anesthetized, paralyzed, and intubated. Even after having observed this process numerous times, I am still struck by the diverging interpretations of these events by the patient and the OR staff. The patient always perceives this experience as special or unique, because for the patient it is. But for the OR staff, it is as routine as sitting down at a desk and turning on the computer screen first thing in the morning.

As a medical student on my cardiac surgery rotation, I began my tasks as soon as the patient was anesthetized. I removed the blankets and the hospital gown from the patient's body. I peeled off the socks. I placed and secured a Foley tube catheter in the urethra to drain the bladder. Then, I used an electric razor to shave the chest, armpits, groins, and legs, occasionally stopping to lift up the clumps of free hair with a thick roll of silk tape. Once this was done, I scrubbed the body with sponges soaked in cold, soapy water. I dried off the patient with sterile towels and then placed sterile drapes across him or her from head to toe. At this point, the surgeon would step in to feel for the relevant bony anatomical landmarks and use a marker to outline the points of incision. The process of transforming an awake and talking patient into a ventilator-dependent, sterile body with ink markings on it, takes about an hour, on average. All of this happens prior to first incision. For most of that hour, the patient is unconscious and uncovered.

In the OR, the sterile field is sacred. The acts of removing clothes, shaving, scrubbing, and draping the patient are contextualized in an ethical, life-saving purpose. In surgery these are necessary steps to prevent infection, but the actions are not always benign and this noble context is not something that we can take for granted. Similar acts, although with a completely different purpose, were used as a series of initiatory humiliations for newly arrived prisoners at Auschwitz and other concentration camps by the *Schutzstaffel* (SS), the Nazi paramilitary staff. In their scheme, the act of cleansing the prisoners' bodies connoted a much darker concept. One of the victims, Marianne F., described the experience of undressing completely in front of the SS prior to entering the shower or "sauna," having all of her bodily hair shaved, and lastly being tattooed with a number.<sup>2</sup> Everyone underwent the same process regardless of their age, sex or degree of modesty, rendered equal in the process of becoming nothing. In his book, *Auschwitz: A Doctor's Eyewitness Account*, Miklos Nyiszli, a prisoner at Auschwitz and himself a doctor who was eventually forced to work with the infamous Dr. Josef Mengele, recalls entering a room labeled, "Baths & Disinfection" where he was undressed, washed, rubbed with noxious chemicals, and tattooed. In a moment of solemn awareness, he writes that "Dr. Miklos Nyiszli had ceased to exist, [and had now become] merely KZ prisoner Number A 8450."<sup>3</sup>

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<sup>2</sup> Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 2000), 165.

<sup>3</sup> Miklos Nyiszli, *Auschwitz: A Doctor's Eyewitness Account* (New York: Arcade Publishing, 2011), 23.

This history reminds us that the acts of removing clothing, hair, washing, and labeling the human body cannot only sterilize, but dehumanize. In surgery most of these steps cannot be modified, as they are necessary to prevent infection. However, by consciously acknowledging the patient's perspective — a deeply vulnerable experience — surgeons and other OR staff can preserve their patients' dignity and modesty. Empathy can elevate these acts to a narrative of healing.

## “Muscle memory”

By the second week of my cardiac surgery rotation, certain tasks had become a part of my muscle memory. Movements that were once slow and purposeful became efficient and swift, which one could argue is the general aim of surgical education. But there was also an unintended side-effect: the more I performed my tasks from muscle memory, the less mindful I became of the bigger picture, which in this case, was the patient's story. I found myself performing certain tasks without being mindful of why I was doing them or what purpose they served in the scope of the operation, as a whole. On some days, I simply walked into the OR when it was time for me to do my part and, like a technician, left once I had completed my tasks. I shaved and washed bodies without knowing the patients' names. Through these encounters, I grew increasingly competent and confident in the skills I was performing, but I could not have explained why an operation was necessary for a particular patient, or who the patient was, because I had never met him or her. A procedure had become just the carrying out of a mechanical process.

Admittedly, it is in the best interests of patients that surgeons hone their technical skills. At times, the surgeon's performance in a challenging operation may depend on his or her ability to quiet his or her own emotional, ethical, or other considerations. However, there is a critical distinction between consciously utilizing muscle memories to serve well-thought-out purposes and mindlessly applying them to any setting. The former is an important attribute of any skilled surgeon. The latter can mark a dangerous slippery slope where physicians devolve into technicians and do not consider the ethical implications of their work.

Auschwitz offers one of the more extreme examples. Many physicians who worked there developed a tendency to compulsively focus on individual topics or problem-solve *technical* aspects (“*das rein Fachliche*” or the “the purely technical”), helping them to avoid thinking about the morality of their actions. As the psychiatrist and medical historian Robert Lifton has written, technically talented people who “... believed themselves to be experts ... pressed forward and engaged themselves ...” with the technical aspects of how to best run the crematoria.<sup>4</sup> They began to question how the gas chambers could accommodate more bodies or kill them at a faster rate. One doctor wanted to figure

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<sup>4</sup> Lifton, 178.



out how to effectively ignite piles of corpses and remarked, “You can imagine — naked — nothing burns. How does one manage to [burn] this?”<sup>5</sup> It seems absurd to ponder the best way to burn dead bodies instead of asking why those bodies had to die, but this is part of how these physicians coped with the overwhelming guilt and psychological torment of participating in such heinous crimes. They evaded the moral and ethical considerations by treating them as purely technical and pragmatic concerns.

A similar phenomenon occurred among Nazi doctors who were hungry for surgical experiences. In the name of mastering technical skills, they operated on prisoners suffering from their conditions of interest. Ethics aside, they felt that they had found an ideal surgical laboratory, not realizing that this was a Faustian bargain that marked their regression into automatons, ready to apply their skills to any operation regardless of its morality.

While certainly in no way equivalent to the conditions under which surgeons normally find themselves, the tendency to focus on technique alone adopted as a coping mechanism by physician prisoners in the camps forced to participate in killing their fellow inmates, can nevertheless serve as a cautionary tale.

It is a common tendency in modern surgery to focus too much on the technical aspects. Some degree of it may be inevitable for doctors in training in order that they master certain skills. But doing so can also lead to a lack of ethical awareness, which only comes into view when the surgeon or surgeon-in-training bears in mind the larger context of what he or she is involved in. Without awareness of the purpose and goals of a procedure, one cannot ascertain if a procedure is being used to heal or to harm. One runs the risk of merely being a technician on automatic pilot. As physicians we hold the responsibility of safeguarding our patients’ and communities’ well-being. A part of that responsibility is to always ensure a meaningful application of our skills.

## Anesthesia

Patients whom I cared for in the OR were usually deeply under anesthesia. I found this surprisingly comforting. Not only did it mitigate the fear of causing pain during procedures, but it also shielded me from the unnerving prospect of making a mistake that, in the case of awake patients, would lead to increased suffering for them and shame for me. It also liberated the medical staff to discuss topics, even humorous or inappropriate ones, which were unrelated to the operation, instead of worrying about how our talk would be received by the patient. In other words, we were able to act as if the patient were not there at all.

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<sup>5</sup> Lifton, 177.

Studies have noted how surgeons' speech, behavior, and even teaching methods can drastically change when patients are under anesthesia.<sup>6</sup> (In an article in the *American Journal of Surgery*, Claire Smith and fellow researchers proposed surgeon-patient communication guidelines to balance patient comfort with teaching and operative efficacy.<sup>7</sup>) I was not aware of how much I relied on anesthesia to shield me from the psychological stresses of being around fully conscious patients, until I interacted with awake patients during minimally invasive procedures. Even when it came to innocuous chores, such as washing a patient's body, I found I experienced a substantially greater degree of empathy with awake patients and frequently felt compelled to ask them how they were doing. In contrast to working with anaesthetized patients, for example, I always made sure to use warm water to scrub their bodies so that they would not feel cold. I shaved more cautiously in an effort to avoid razor burns. Instead of joking with my co-workers, I had conversations with the patients themselves. This led me to realize that knowing that I was dealing with a human body was not enough to arouse empathy in me. Rather, my empathy seemed to vary significantly depending on the degree of patient awareness.

Anesthesia diminishes patient sensation, but just as potent, it can reduce physician empathy. In the setting of Auschwitz, physicians found reassurance in and strongly adhered to the false belief that *Zyklon-B*, the German name for hydrogen cyanide, caused a painless death. Rudolf Höss, the commander of Auschwitz, remarked that "The *doctors explained* to me that the prussic acid [*Zyklon-B*] had a paralyzing effect on the lungs ... that was so quick and strong that death came before the convulsions could set in ..." and cause a terrible choking sensation.<sup>8</sup> The physicians rejected the alternative method of killing — extermination by shooting — because it would surely cause a greater degree of pain and suffering. It is chilling to imagine in retrospect how one method of killing could be deemed more permissible simply because it causes less pain. After all, the "painless" method resulted in perhaps the most horrendous genocide in mankind's history.

In surgery, most procedures take place when the patient is under anesthesia. Being aware of how that influences the way we practice is critical. Being aware of someone else's pain is one of the strongest forms of empathy. It holds us accountable for our actions and challenges us to be better. While anesthesia is necessary to modern surgery, we should aim to treat the anaesthetized body as if it still could perceive pain, because physical harm can occur even if the patient is not feeling pain. To take the extreme example of Nazi physician behavior, a painless death, after all, does not change the fact that a murder has occurred.

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<sup>6</sup> Anonymous, "Our Family Secrets," *Annals of Internal Medicine* 163 (2015): 321.

<sup>7</sup> Claire Smith, et al., "Surgeon-Patient Communication During Awake Procedures," *American Journal of Surgery* (July 29, 2016): 30369-5.

<sup>8</sup> Lifton, 162.

## Conclusion

I do not mean to suggest that surgery is unethical by nature. Modern surgery is undeniably a miraculous process that offers cures and hope to patients. Nor can I pretend to summarize in such a short paper the complex psychological shift that enabled doctors to participate in genocide under the Nazi regime. But in discussing some of the ethical pitfalls of the OR and citing some of the experiences of physician prisoners in concentration camps, I do hope to point to the importance of remembering that a procedure must reside within an ethical framework, and that a simple awareness of the larger context of ones actions is at times all that separates a life-saving act from a potentially harmful one. Developing and refining an ethical framework need not be complicated in a perioperative setting — at times, consciously acknowledging that the patient is in a vulnerable position or reminding oneself why certain acts are important in the context of patient care can imbue greater meaning into our work and positively influence those around us. These considerations ought to supplement our current perioperative ethical guidelines.

Surgeons are doers. Our hands are eager to pick up the scalpel or to mend the immediate surgical issue before our minds have fully processed why. The true act of healing is done, however, at the level of thought when we reason out why a patient needs a particular life-saving procedure well before our hands are red and our blades are wet.

# Patient Care Above All Else

## Reexamining Residency Duty-Hour Guidelines

BY PRISCILLA WANG

YALE SCHOOL OF MEDICINE, CLASS OF 2017

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On November 19, 2015, a letter was sent to the Office for Human Research Protection (OHRP) in the United States Department of Health and Human Services urging OHRP to “immediately suspend” a “highly unethical” clinical trial.<sup>1</sup> Signed by Public Citizen, a U.S. consumer advocacy organization, and the American Medical Student Association, the letter specifically targeted the iCOMPARE trial (Competitive Effectiveness of Models Optimizing Patient Safety and Resident Education), a multicenter National Institutes of Health-funded randomized trial comparing patient and educational outcomes of internal medicine residency programs operating under current resident duty-hour restrictions with those following a more flexible duty-hour policy. Spearheaded by investigators from the University of Pennsylvania, Johns Hopkins University, and the Brigham and Women’s Hospital, the iCOMPARE study was designed in reaction to the duty-hour restrictions implemented in 2011 by the Accreditation Council for Graduate Medical Education (ACGME), which evaluates and accredits medical residency programs.

In an interview with *Medscape Medical News*, the director of Public Citizen’s Health Research Group described the iCOMPARE study and a sister study examining looser surgery residency duty-hour restrictions as “among the most unethical studies I’ve seen in the past couple of decades.”<sup>2</sup> Per the November 19 letter, the two main ethical violations alleged were: (1) knowingly exposing internal medicine residents to previously documented health risks of long duty-hour shifts, and (2) a failure to obtain informed consent from resident and patient subjects. The study, the letter authors affirmed, had violated U.S. federal guidelines regarding human-subjects research, as well as key tenets of the Belmont Report, a summary of core ethical principles published in 1979 by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. The writers of the Belmont Report drew significantly from principles first elaborated in the groundbreaking Nuremberg Code, a set of ten ethical principles for

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<sup>1</sup> Michael A. Carome, Deborah V. Hall, Sidney M. Wolfe, and Sammy Almashat, to Jerry Menikoff and Kristina Borrer, November 19, 2015, “Re: Individualized Comparative Effectiveness of Models Optimizing Patient Safety and Resident Education (iCOMPARE) Trial,” <http://www.citizen.org/documents/2283.pdf>.

<sup>2</sup> Robert Lowes, “Two Trials Extending Resident Hours Called ‘Unethical,’” *Medscape*, November 23, 2015, <http://www.medscape.com/viewarticle/854845>.

research elaborated in 1947 as part of the verdict in the infamous “Doctors’ Trial.”<sup>3</sup> The majority of the defendants of this trial were German physicians accused of war crimes including torture, murder, and medical experimentation on inmates in Nazi concentration camps.

The role of physicians in Nazi Germany in aiding mass murder is among one of the darkest ethical chapters in the history of the medical profession. While not absolving the aforementioned physicians of personal responsibility, historians such as Robert Jay Lifton have noted that their actions were facilitated and promoted by cultural and scientific beliefs deeply held by their professional community during their era.<sup>4</sup> In this essay, I focus on duty-hour restrictions to argue that there are troubling parallels between the enabling beliefs of the medical profession during Nazi Germany and the assertions and rationales used by the modern-day American medical profession to justify the treatment of medical trainees. By absolutely no means do I mean to equate the end *actions* of these two groups, but I do assert that there are concerning similarities in the following practices used to rationalize their respective actions: use of romanticized or pseudo-religious language to describe the role and goals of the medical profession, glorification of physician suffering, and a willingness to overlook the rights of particular individuals in pursuit of a “greater good” advocated for by the profession.

## Resident Duty-Hour Restrictions: Historical Roots

In 1984, 18 year-old Libby Zion died in New York Hospital, possibly due to an interaction between her regularly prescribed antidepressant and a medication that she was administered during her hospital admission. At the time of her death she was under the care of two medicine residents, who were on overnight duty and covering close to 40 patients. Aided by the zealous efforts of Zion’s father, a journalist and lawyer angry at the hospital’s staffing situation, the so-called “Libby Zion Case” set into motion a cascade of significant changes in medical resident supervision and duty-hour guidelines.<sup>5</sup> These culminated in a milestone for national duty-hour restrictions in 2003, with the ACGME mandating for the first time that resident workweeks be limited to 80 hours total, with no individual period of work exceeding 30 hours. In 2008, at the request of Congress, the Institute of Medicine (IOM) released a literature-based report that concluded that the existing ACGME standards required revision to address continued patient and trainee safety issues.<sup>6</sup> The ACGME subsequently released updated, stricter guidelines in 2011,

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<sup>3</sup> Evelyn Shuster, “Fifty Years Later: The Significance of the Nuremberg Code,” *New England Journal of Medicine*, 337 (1997): 1436-1440.

<sup>4</sup> Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 1986).

<sup>5</sup> Barron H. Lerner, “A Case That Shook Medicine: How One Man’s Rage Over His Daughter’s Death Sped Reform of Doctor Training,” *The Washington Post*, November 28, 2006.

<sup>6</sup> “Resident Duty Hours: Enhancing Sleep, Supervision, and Safety,” *Institute of Medicine, National Academy of Science*, December 2008.

including restricting interns (first year residents) to a maximum of 16 hours worked consecutively.

Not all physicians and training programs welcomed these guidelines. Pointing to small studies conducted after the new 2011 restrictions, a vocal fraction of the medical community argued that the implementation of duty-hour restrictions was potentially hindering medical education while not demonstrating clear benefits to patient safety.<sup>7</sup> They emphasized the need for additional, more high-powered studies examining the impact of different work-hour regimens. Loosening work-hour restrictions (most notably allowing interns to work 28 or more hours in a row, as opposed to 16), the iCOMPARE study was subsequently implemented in the 2015-2016 academic year at 63 internal medicine residency programs across the United States.

## Medical Theocracy: Patient Care as a “Divine Purpose”

In the wake of iCOMPARE, the most recent round of debates surrounding resident duty-hour restrictions has centered predominately on issues pertaining to patient safety, as opposed to medical trainee health and well-being. For example, the main argument immediately following Libby Zion’s death was that overworked, tired medical residents would be more prone to clinical errors that could endanger patients. A frequently cited counterargument also focuses on patient outcomes, suggesting that shorter work shifts would increase the number of handoffs between teams and therefore potentially increase opportunities for medical error.<sup>8</sup> The design of the iCOMPARE study further reinforces a patient-centered focus, with its primary measured outcome being 30-day mortality rates of patient populations at study institutions.<sup>9</sup> Similarly, in its letter responding to the concerns raised by Public Citizen about iCOMPARE, the ACGME first cites the need for additional studies to “evaluate the effects of duty hours on patient safety.”<sup>10</sup>

Arguments in the duty-hours debate pertaining to the resident experience primarily focus on “educational quality,” with the implication also being that a quality education is the means to the end of achieving high-quality patient care. For example, the primary goal listed on the [clinicaltrials.gov](http://clinicaltrials.gov) webpage for the iCOMPARE study is to “examine patient

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<sup>7</sup> Andis Robeznieks, “‘Shift Work’: 24-hour Workdays Are Out as Residents, Hospitals Deal with Changes, Mixed Feelings on Restrictions,” *Modern Healthcare*, July 25, 2011, <http://www.modernhealthcare.com/article/20110725/MAGAZINE/307259963>.

<sup>8</sup> Rob Stein, “Is It Safe For Medical Residents To Work 30-Hour Shifts?” *National Public Radio*, December 7, 2015, <http://www.npr.org/sections/health-shots/2015/12/07/458049301/is-it-safe-for-medical-residents-to-work-30-hour-shifts>.

<sup>9</sup> “Individualized Comparative Effectiveness of Models Optimizing Patient Safety and Resident Education (iCOMPARE),” *ClinicalTrials.gov*, August 29, 2016, <https://clinicaltrials.gov/ct2/show/NCT02274818>.

<sup>10</sup> Thomas J. Nasca to Michael Carome, Sidney Wolfe, Deborah Hall, and Sammy Almashat, December 7, 2015, “RE: iCompare and FIRST Trials” [http://www.citizen.org/documents/2285\\_ACGME\\_Response.pdf](http://www.citizen.org/documents/2285_ACGME_Response.pdf).

safety and costs as well as quality of education.”<sup>11</sup> The secondary outcomes cited by iCOMPARE that are related to trainee experience include “sleep duration,” “behavioral alertness,” “self-perceived sleepiness,” “time spent in direct patient care,” and “trainee satisfaction with education.”<sup>12</sup> In neither the iCOMPARE grant application nor the trial protocol do the investigators specifically and thoroughly discuss the previously noted risks of sleep deprivation to medical residents’ well-being, as detailed in the 2008 IOM report on resident hours, such as effects on emotional and mental health (e.g. depression), needle-stick injuries, and motor vehicle accidents.<sup>13</sup>

The relegation of resident experience to that of a secondary concern is reinforced by the study design of the iCOMPARE trial as a non-inferiority trial. This implies that longer working shifts would be acceptable to the investigators if the experimental group with looser work-hour restrictions showed no *worsened* outcomes with regard to patient safety and “educational quality.” Conversely, if resident health or sleep time was held in similar regard as an outcome, one might imagine a contrasting study designed as a superiority trial; in this case the looser work-hour restriction arm would be required to show *improved* patient outcomes and educational quality to justify allowing a move away from current work-hour restrictions.

This focus on patients over providers is not unique to the realm of duty-hours; it reflects the prevailing sentiment espoused by the majority of medical societies and organizations. In the American Medical Association Code of Ethics, it is stated that physicians have the “ethical responsibility to place patients’ welfare above the physician’s own self-interest.”<sup>14</sup> The American College of Physicians ethics manual states that medicine is a profession, in which members must abide by “a code of ethics and a duty of service that puts patient care above self-interest.”<sup>15</sup> The 2011 ACGME document on new work-hour restrictions speaks of “the establishment of a humanistic learning environment in which residents learn and demonstrate effacement of self-interest in favor of the needs of their patients.”<sup>16</sup>

There are obvious and laudable reasons why one would want his or her physician to avoid inserting self-interest into the patient-doctor relationship. Most people would be very troubled, for instance, by a physician who deliberately orders unnecessary medical tests in

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<sup>11</sup> “Individualized Comparative Effectiveness of Models Optimizing Patient Safety and Resident Education (iCOMPARE),” *ClinicalTrials.gov*, August 29, 2016, <https://clinicaltrials.gov/ct2/show/NCT02274818>.

<sup>12</sup> “Individualized Comparative Effectiveness of Models Optimizing Patient Safety and Resident Education (iCOMPARE),” *ClinicalTrials.gov*, August 29, 2016, <https://clinicaltrials.gov/ct2/show/NCT02274818>.

<sup>13</sup> “Resident Duty Hours: Enhancing Sleep, Supervision, and Safety,” *Institute of Medicine, National Academy of Science*, December 2008.

<sup>14</sup> “Code of Medical Ethics,” *American Medical Association*, June 2016, <https://www.ama-assn.org/about-us/code-medical-ethics>.

<sup>15</sup> “ACP Ethics Manual Sixth Edition,” *American College of Physicians*, January, 2012, <https://www.acponline.org/clinical-information/ethics-and-professionalism/acp-ethics-manual-sixth-edition-a-comprehensive-medical-ethics-resource/acp-ethics-manual-sixth-edition>.

<sup>16</sup> *The ACGME 2011 Duty Hour Standards: Enhancing Quality of Care, Supervision and Resident Professional Development* (ACGME: 2011), Accreditation Council for Graduate Medical Education, [http://www.acgme.org/Portals/o/PDFs/jgme-monograph\[1\].pdf](http://www.acgme.org/Portals/o/PDFs/jgme-monograph[1].pdf).

order to increase her profit margin, or a clinician-researcher who pressures patients to join his clinical trial to increase the trial's sample size. Taken to the extreme, however, the promotion of "effacement of self-interest in favor of the needs of ... patients" could result in actual detriment to self-welfare in the process of caring for patients. Of greater concern is that vulnerable populations in the medical community — i.e. trainees with limited self-advocacy options and who are dependent on supervisor evaluations to advance their careers — may be the ones who experience these harmful effects the most, in the seemingly untouchable name of "patient care."

In *The Nazi Doctors*, his seminal treatise on the paths that led German doctors to facilitate Nazi genocide, historian Robert Jay Lifton argues that a key factor spurring on the ethically questionable participation of doctors was the romanticization and deification of the end goals of the Nazi State. He writes:

One can speak of the Nazi state as a 'biocracy.' The model here is a theocracy, a system of rule by priests of a sacred order under the claim of divine prerogative ... that of cure through purification and revitalization of the Aryan race ... Just as in a theocracy, the state itself is no more than a vehicle for the divine purpose, so in the Nazi biocracy was the state no more than a means to achieve 'a mission of the German people on earth.'<sup>17</sup>

That end vision itself — in this case preservation and elevation of the "Aryan race" — was often described in both romanticized and religious terms. Physicians played a key role in this model by supporting the goal and providing a practical means of carrying it out. Lifton uses the term "medical fundamentalism" to describe this pseudo-religious thought system and subsequent violent defense of an exalted goal. In Lifton's words, "in all fundamentalisms ... usually religious or political, there is the sense of profound threat to what are considered fundamental beliefs."<sup>18</sup>

In the current medical professional community in the United States, there is a similar strain of "medical fundamentalism," with "the needs of the patient above all else" as the "fundamental belief." The language used to describe patient care often uses religious and/or romantic imagery. For example, in his 2015 remarks to the American College of Cardiology, physician-writer Abraham Verghese describes the doctor's interaction with a patient as ritualistic: "I'm wearing a white ceremonial outfit with shamanistic tools in the pockets ... then the patient disrobes and allows touch ... tell me that this is not an important ritual."<sup>19</sup> The modern Hippocratic Oath, used by many medical schools,

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<sup>17</sup> Lifton, 17.

<sup>18</sup> Lifton, 488.

<sup>19</sup> Abraham Verghese, "I Carry Your Heart," *JAMA Cardiology* 1(2016): 213-215.



describes the tenets of the oath as a “covenant.”<sup>20</sup> Patient care is often also commonly described as a “calling,” a word often used in religious contexts to describe a sense of mission or greater purpose conferred by a higher power.

In my own experience as a medical student, I have frequently heard older physicians bemoaning the younger medical generation as, in their view, falling short of this calling and posing a threat to the high standards of patient care upheld during the prior “golden days” of practice. Standing in place holding a skin retractor during a surgical procedure, I was once subjected to a 20-minute lecture by a well-known gynecologic surgeon about how my generation lacked a sense of wholehearted dedication to patient care. On another occasion, a private practice attending lamented to me in his clinic about the irreverence of modern graduates toward the medical profession, and that younger physicians “no longer see medicine as a calling but as a nine-to-five job.”

Buried within these statements, and deeply entrenched in modern medical culture, is a glorification of suffering on the part of the physician and a perspective that hard work and pushing the bounds of one’s natural physical and emotional limits may be necessary to achieve excellence as a doctor. In the words of Dr. Candace Sloan, chair of the Massachusetts Board of Registration of Medicine, “in medical training, we’re taught we have to almost be superhuman.”<sup>21</sup> Sample comments by registered physicians on a *Medscape* article critiquing the iCOMPARE study describe some of these sentiments:<sup>22</sup>

Residents today indeed lack the vigorous training as compared to what it was thirty years ago. One of the skill [sic] indeed is [to be] able to function when one is in extreme exhaustion and make decision[s] when woken up from REM sleep. (*Urologist*)

I worked well over 100 hours/week. It was torture sometimes! But ... the resident who must go home early, on a clock, does all the work, all night, and then doesn’t learn how the case resolved. (*Orthopedic surgeon*)

Was the old paradigm abusive and less humane, absolutely. Did it create some less human workaholic physicians, most assuredly. But it also created some of the most knowledgeable and dedicated physicians ... Nobody is looking at hour restrictions when they are applauding a conjoined twin separation or similar multi-hour operation. (*Orthopedic surgeon*)

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<sup>20</sup> “Hippocratic Oath, Modern Version,” Johns Hopkins Sheridan Libraries & University Museums, Johns Hopkins University, last updated on December 14, 2016, <http://guides.library.jhu.edu/c.php?g=202502&p=1335759>.

<sup>21</sup> Elisabeth Poorman, “I Felt Alone But I Wasn’t: Depression Is Rampant Among Doctors In Training,” *CommonHealth*, WBUR, August 19, 2016, <http://www.wbur.org/commonhealth/2016/08/19/depression-resident-doctor>.

<sup>22</sup> Lowes, “Two Trials Extending Resident Hours Called ‘Unethical.’”

I worked 30 out of 30 straight days as a second year resident in charge of 27 patients at Charity Hospital, seeing every patient every day. Did that make me a better doctor? You better believe it. (*Emergency medicine physician*)

A similar emphasis was placed on the glorification of sacrifice on the behalf of a greater good in the medical profession during Nazi Germany. German culture, in particular, compared to British and French culture for instance, focused on the “tragic-heroic motif” and “celebration of heroic sacrifice.”<sup>23</sup> The same applied to the medical profession. The Nazi-authored book *The Face of the Germanic Doctor over Four Centuries*, for example, features the story of Paracelsus, a Swiss-German physician-alchemist, who (in this book’s interpretation) struggles through despair and suffering to promote the higher ideal of the health of the national body.<sup>24</sup> Lifton writes that “the doctor, like everyone in Nazi Germany, was expected to become ‘hardened’” in light of the assertion that “the life of the individual has meaning only in the light of that ultimate aim.”<sup>25</sup> It became framed as a matter of professional responsibility for physicians to lay down their individual preferences and concerns on behalf of a national patient.

## Reexamining Professional “Expectations” and Tradition

In contemporary American medical culture, however, should it be considered a matter of expected professionalism that physicians and medical trainees rise to a similar level of personal sacrifice? And how much sacrifice is enough? Concern should arise when a well-established professional expectation is allowed to persist without any reexamination of its ethics in light of new evidence and misgivings. For example, to the primary investigators, grant funders, and the Institutional Review Board (IRB) that approved the iCOMPARE study, it appears to be a foregone conclusion that residents should be putting in extremely long work hours. In the “Potential Risks” section, the grant application in fact states that “the greatest risk to participants is the risk to confidentiality,” without further discussion of documented risks cited by previous ACGME guidelines in favor of stricter duty-hour restrictions.<sup>26</sup> The iCOMPARE study was then approved without requiring investigators to obtain informed consent from residents. According to one of the study’s primary investigators, it would not have been practical to get consent from all the residents (and patients) participating in the study.<sup>27</sup> It seems questionable at best and unethical at worst, however, to forgo informed consent in the name of practicality, particularly in light of the

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<sup>23</sup> Lifton, 481.

<sup>24</sup> Lifton, 31.

<sup>25</sup> Lifton, 31.

<sup>26</sup> “Research Project Cooperative Agreement for iCOMPARE-CCC Project,” NIH, Grant 1U01HL125388-01A1, August 10, 2015, [Award Letter from National Institutes of Health, Dept. of Health and Human Services, Grant Submission by David Asch], [http://www.citizen.org/documents/iCOMPARE-grant\\_1U01HL12538801A1\\_UPenn\\_Key%20Sections.pdf](http://www.citizen.org/documents/iCOMPARE-grant_1U01HL12538801A1_UPenn_Key%20Sections.pdf).

<sup>27</sup> Stein, “Is It Safe For Medical Residents To Work 30-Hour Shifts?”

literature describing the risks of sleep deprivation in medical residents and other study populations.

If we regard the issue in a much more extreme setting, it bears noting that sleep deprivation and “sleep management” have both been deemed unethical as torture techniques by multiple international bodies. “Sleep management” is a form of interrogation in which detainees’ sleep schedules are disturbed even without depriving the detainee of sleep.<sup>28</sup> In fact, in the 1963 CIA manual, sleep disruption is recommended over sleep deprivation as a more effective interrogation method to “sap [the] will.”<sup>29</sup> Sleep deprivation, the deliberate limitation of sleeping time, was central to the George W. Bush administration’s “enhanced interrogation techniques” and was condemned as being unethical by the United Nations Committee Against Torture.<sup>30</sup> These criticized interrogation guidelines (in the infamous “Appendix M” of the Army Field Manual) include the “safety” parameter that detainees should at least get “four hours of continuous sleep every 24 hours” — a requirement that most medical residents completing a 28-hour on-call shift cannot even expect to meet, given their need to respond to urgent pages and emergency medical situations.<sup>31</sup> I am not attempting to suggest that long resident work-hours are equivalent to torture or interrogation techniques. There are clearly significant differences between the two settings: residents would not work more than one 28-hour shift in a row, and there are many situations in which individuals would even willingly deprive themselves of sleep. From a perspective of situational ethics, however, it is worth reexamining why we tolerate or even celebrate sleep disruption or sleep deprivation in one context but condemn it so vociferously in another, especially when in both cases those affected lack the autonomy or hierarchical standing to refuse. Certainly, the end goals of the two situations (provision of patient care versus coerced extraction of information from a detainee) vary quite significantly and the former goal would appear more acceptable to most onlookers. However, as extreme examples, such as the behavior of Nazi physicians demonstrate, simply using an “ends justify the means” rationale can lead to ethically questionable actions.

The issue of sleep deprivation experienced by residents also gains greater urgency in light of recent medical trainee suicides and a recent study suggesting that almost one in three resident physicians experiences depression or depressive symptoms.<sup>32</sup> In a recent September 2016 press release, Marsha Rappley, a physician and chair-elect of the

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<sup>28</sup> Jennifer K. Elsea, “Lawfulness of Interrogation Techniques under the Geneva Convention,” *Congressional Research Service Report for Congress*, Order Code RL32567, September 8, 2004, <https://fas.org/irp/crs/RL32567.pdf>.

<sup>29</sup> “Kubark Counterintelligence Interrogation,” Central Intelligence Agency, July 1963, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB122/CIA%20Kubark%201-60.pdf>.

<sup>30</sup> Ed Pilkington, “UN Torture Report Condemns Sleep Deprivation Among US Detainees,” *The Guardian*, November 28, 2014, <https://www.theguardian.com/law/2014/nov/28/un-condemns-sleep-deprivation-among-us-detainees>.

<sup>31</sup> Pilkington, “UN Torture Report Condemns Sleep Deprivation Among US Detainees.”

<sup>32</sup> Douglas A. Mata, *et al.*, “Prevalence of Depression and Depressive Symptoms among Resident Physicians: A Systematic Review and Meta-analysis,” *JAMA* 314 (2015): 2373-83.

American Association of Medical Colleges (AAMC), is quoted as saying that the medical profession has “reached a crisis point — in fact a public health crisis” with regard to burnout, depression, and suicide within the medical profession.<sup>33</sup> Among all professions, the medical field has one of the highest suicide rates, with rates up to twice that of the general population (among female physicians, two-and-a-half to four times greater).<sup>34</sup> In 2014, two New York medical interns in separate residency programs committed suicide in the span of one week; in March 2016, another medicine resident jumped to her death.<sup>35</sup>

We cannot know what prompted these residents to end their lives, but studies show that depression rates increase by 15-30% during the intern year (first year) of residency.<sup>36</sup> One study of interns in the University of Pennsylvania noted an increase of moderate depression prevalence from 4.3% to 29.8% in the span of the year, with a concomitant increase in chronic sleep deprivation from 9% to 43%.<sup>37</sup> Studies have linked sleep loss to disordered emotional brain responses<sup>38</sup> and an increased risk of developing a mood disorder such as depression or anxiety.<sup>39</sup> Additionally, since the 1970s and even prior to the death of Libby Zion, there has been a growing body of literature examining the results of sleep deprivation in residents specifically, which has found an inverse correlation between amount of sleep and reported mood symptoms, including sadness, clinical depression, anger, and irritability.<sup>40</sup> From this perspective, one could argue that a program of training that systematically disturbs sleep patterns, deprives trainees of sleep on a regular basis, and provides little time off for rest poses not only a challenging rite of passage but potentially a public health risk.

## The Need to Rethink the Culture of Medical Training

The most frightening aspect of the medical profession’s participation in torture and murder in Nazi Germany is not necessarily what the profession *did*, horrific as those

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<sup>33</sup> Rebecca Greenberg, “Leaders in Academic Medicine Address Physician Well-being and Resilience,” American Association of Medical Colleges, September 2016, [https://www.aamc.org/newsroom/newsreleases/469244/leadership\\_forum\\_09072016.html](https://www.aamc.org/newsroom/newsreleases/469244/leadership_forum_09072016.html).

<sup>34</sup> Louise B. Andrew, “Physician Suicide,” *Medscape*, October 2016, <http://emedicine.medscape.com/article/806779-overview>.

<sup>35</sup> Pamela Wible, “Three Young Doctors Jump to Their Deaths in NYC,” *Pamela Wible MD*, March 12, 2016, <https://www.idealmedicalcare.org/blog/three-young-doctors-jump-to-their-deaths-in-nyc/>.

<sup>36</sup> Douglas A. Mata, D.A. *et al.*, “Prevalence of Depression and Depressive Symptoms among Resident Physicians: A Systematic Review and Meta-analysis.”

<sup>37</sup> I. M. Rosen, *et al.*, “Evolution of Sleep Quantity, Sleep Deprivation, Mood Disturbances, Empathy, and Burnout among Interns,” *Academic Medicine* 81 (2006): 82-85.

<sup>38</sup> S.S. Yoo, *et al.*, “The Human Emotional Brain Without Sleep – A Prefrontal Amygdala Disconnect,” *Current Biology* 17 (2007): R877-878.

<sup>39</sup> N. F. Watson, *et al.*, “Sleep Duration and Depressive Symptoms: A Gene-Environment Interaction,” *Sleep* 37 (2014): 351-8.

<sup>40</sup> I. M. Rosen, *et al.*, “Evolution of Sleep Quantity, Sleep Deprivation, Mood Disturbances, Empathy, and Burnout among Interns,” J. S. Samkoff, and C. H. Jacques, “A Review of Studies Concerning Effects of Sleep Deprivation and Fatigue on Residents’ Performance,” *Academic Medicine* 66 (1991); E. M. Al-Maddah, *et al.*, “Prevalence of Sleep Deprivation and Relation with Depressive Symptoms among Medical Residents in King Fahd University Hospital in Saudi Arabia,” *Sultan Qaboos University Medical Journal* 15(2015): e78-84.

actions were. Rather, it is the unchecked *process* by which the profession arrived at that point—the fact that physicians’ actions were facilitated by the environment in which they practiced, their cultural ideas and professional beliefs, and what was upheld as an ultimate good. Similarly, the purpose of this essay is not to argue for a particular reform, such as the abolishment of 28-hour shifts in residency training or the promotion of a particular medical resident duty-hour regimen. My purpose is to draw attention to the potentially questionable belief structures that the modern-day American medical profession currently uses to justify current work expectations for residents. Today, the ostensibly laudable goal of patient care has been elevated to an unchallengeable sacred standing, such that the means used to achieve that end may escape rigorous ethical examination. Physician suffering is framed as a rite of passage and celebrated almost to the point of masochism, such that legitimate concerns are at times framed as weakness and risks to emotional health dismissed as inconsequential.

Perhaps physician-trainees in decades past were able to survive working more than 100 hours a week and 36-hour shifts, but that does not automatically lead to the imperative to continue this practice. To truly cultivate an ethical model of medical education and physician training, the medical profession needs to continually reexamine its professional practices, in light of new evidence and a changing external environment. We need to recognize that the medical system that trainees practice in today has changed greatly over the past two decades, with a much larger body of knowledge to master and with a significantly increased documentation and reporting burden. We need to make sure that we are asking the right questions. If handoffs appear to increase clinical errors, the question should not necessarily be how to eliminate handoffs, but how to *improve* them. If a system in which residents working 16 hours a day six days a week for several years appears to be producing “less experienced” graduates, then perhaps we should question the educational *quality* of the time spent in the hospital, as opposed to increasing the quantity.

Most importantly, we need to ensure that we are using the right equations in our calculations, and giving proper — and ethically sound — weight to the variable of resident mental health and physical wellbeing. In a profession that has long sworn an oath to “do no harm,” there is a strange incongruity in a model that requires damaging one’s health in order to heal others. Unquestionably, any medical resident must be willing to work hard to achieve a competent level of practice, but surely we would want to limit any unnecessary suffering among trainees, just as we aim to do so for patients. Additionally, if we subscribe to a belief that the intangible components of the doctor-patient interaction — rapport, an emotional connection, a relationship of trust — are just as critically important as the biomedical care that is provided, surely we want to cultivate future generations of physicians that have the physical and emotional bandwidth to engage fully with their patients, instead of directing their internal resources toward merely “surviving.” Surely the medical profession seeks to foster healers, not produce martyrs.

# Assessing Quality of Life for a Suicidal Patient

BY BEN YU

UNIVERSITY OF PENNSYLVANIA PERELMAN SCHOOL OF MEDICINE,  
CLASS OF 2017

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I met Joe on a muggy July morning. When I walked into the breakfast room and summoned him for his intake interview with the inpatient team, he merely blinked at me, very slowly took another bite of his pancakes, and unfolded his lanky frame from his seat to follow me out of the room. At full height, Joe was six-foot-five, but built like a very frail bird, all brittle bone, with the hospital-issued pajamas drooping off his narrow frame. His movements were jerky, as if he were a marionette controlled by a tipsy puppeteer. But what caught the eye most immediately was the stuffed toy elephant he was holding. In his huge hands, it looked like a miniature toy, and he clutched it tightly as he shuffled after me.

The team was at ease. This wasn't like other intakes we'd done, with patients screaming, cursing, being forced into the room by security, or behaving in a floridly manic or psychotic manner. Those interviews tend to be tension-filled, with everyone in the room constantly on high alert. But this was a harmless old man — probably vaguely depressed, likely just lonely, maybe with a touch of social anxiety — carrying a toy elephant.

The interview started easily enough: "What brings you in; tell me about yourself," the standard opening salvo. And he gave us ... nothing. As I volleyed question after question at him, he just sat quietly with his eyes locked on the table and his hands slowly stroking the elephant. After the sixth or seventh question with no response, I stopped. I wanted to see what he would do next. Finally, he looked up from the table and said, quietly and evenly, "I am in so much pain all the time. Every day I wake up and ask myself what the whole fucking point of this is."

Joe wasn't histrionic. He wasn't combative. He wasn't agitated or delirious or recalcitrant or any of the other things we deem patients to be when they don't want to speak to us. He had said what he wanted to say. We had the note from the crisis response center that had sent him to us: "Arrested at a train station for being on the train tracks and refusing to cooperate with the police; told everyone all he wanted to do was die; brought to the

psychiatric crisis center; admitted to inpatient care for further management.” He had no ID, no friends or family he would admit to, nobody for us to either inform or question.

Over the course of the next three days, we pieced together some of the details of Joe’s story. He was homeless and drifted from shelter to shelter. He had had over 40 inpatient psychiatric admissions for depression and suicidality, and consistently refused all mental health services set up for him. He had arrived recently from out of town as a cargo train stowaway.

All I ever saw him do over those first few days in the hospital was pet his toy elephant and stare at the TV in the common room. Once or twice he traced slow, shuffling laps from one end of the L-shaped unit to the other. He still wanted to die, he wanted no part of any medication or talk therapy, and he said he was going to go finish himself off as soon as he was released.

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One of the things we debated vigorously on our FASPE trip, in a conference room under the Topography of Terror Documentation Center in Berlin, was whether human life has intrinsic value. Should a physician’s goal always be to save life? Should that be the end-all and be-all of what it means to be a physician? During our debate, we drew a distinction between the intrinsic sanctity of life and quality of life, which can be defined as an individual’s subjective lived experience. I am unmoved by the former, but the latter — the goal of improving a person’s quality of life — is what has most driven me to become a physician.

I believed Joe’s pain — the chronicity of it, the impassability of his depressive abyss, the sweet anticipation of the release of death. His life was already a jagged string of almost-suicides, followed closely by some period of time suspended in the numbing, shoelace-free tombs of various inpatient psychiatric wards. As I thought about Joe, I felt a deep sense that he was right, that any further life for him was most likely only going to tighten the emotional screws, day after endless day. Regardless of the Hippocratic Oath I had sworn, and all the teachings on morality that I’d encountered and thought I had absorbed into my belief system, my strongest impulse was to release Joe from the hospital, so that he could end his life.

In the case of more objective disease states, such as kidney failure, there are blood tests one can point to in order to support the claim that a patient needs to stay in the hospital for treatment. In the case of suicidal thoughts or actions, as with many other psychiatric ailments, there is no objective data to point to. Physicians listen to their patients, examine the evidence and the sequence of events that have led up to the moment of intake, and then they decide whether or not the patient is at such a high risk of harming him or herself

that admitting the patient is necessary. Some would refer to the current method of suicide assessment as an art. Others would call it the absence of science.

Our predictive models for whether someone will commit suicide after being released from an institutional setting are no better than flipping a coin. The best we can do is identify risk factors — previous suicide attempts, suicide attempts in the family, access to guns in the home — and create a safety plan together with the patient, sometimes including a “I-won’t-commit-suicide” declaration that the patient must sign prior to being released. Nevertheless, there is still little scientific data available to demonstrate the predictive value of such safety plans or whether they can influence patient behavior.

Beyond the question of whether interventions are effective in preventing suicide, the main question I had after meeting Joe was whether suicide prevention was even the right treatment for him. This question arose from a wellspring of emotion that resembled sentiments I had heard expressed by fellow medical students and healthcare providers who have worked in intensive care unit (ICU) settings. Often, when taking care of debilitated patients who are slowly wasting away on ventilators and nasogastric tubes, providers experience despair and conflicting emotions, because they feel that no amount of intervention will ameliorate the patient’s condition. In such situations, additional medical intervention isn’t always in the best interests of the patient, as all it really does is prolong suffering without any tangible improvements in the quality of life.

As a physician in training, it seems to me that there must come a point at which the accumulation of pain and suffering experienced by a patient due to disease and/or interventions outweighs the obligation to provide medical treatment. But is this also so in the case of a suicidal patient?

The principle behind the medical treatment of suicidality is to keep a person safe until the most acute emotional pain has passed. According to this model, depression and suicidality are just a phase. When a suicidal patient is younger, has potential he or she can still realize, and does not have a history of chronic institutionalization, holding such a person against his or her will to prevent suicide sits well with my moral intuition. But with someone in Joe’s circumstances, I feel and felt conflicted. Part of me rationalized that my attitude toward Joe’s case was due to the fact that I was seeing suffering in front of me and that my natural impulse is to find a cure for that suffering and to realize that cure. Another part of me wondered whether my attitude was simply the consequence of thinly disguised ageism, and that I was giving up on precisely the sort of patient who needed the most help, but who I subconsciously assumed was too far gone, because of his age.



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One could describe Birkenau today as looking beautiful. The endless rows of decaying chimneys — two for each former bunk — cast an endless symmetry over the fields. On the summer day that we visited the camp, the sky was cloudy. A cloying mist hung everywhere. I spent a long time sitting by one of the murky grey ponds where the Nazis dumped human ashes, struggling with how to square the silent expanse of today with the staggering number of lives that ended there 60 years ago.

Back in our FASPE seminars, we spent a great deal of time trying to understand how the events of the Holocaust could have transpired. In one narrative we discussed, the Holocaust represented the rock bottom of a slippery slope, the end result of a slow decay of the morals and ethics of the everyman, among which medical practitioners formed a critical subgroup.

In our discussions, we tracked the slow decline of medical ethics during the Nazi regime: the T4 euthanasia program, Mengele's train-side selections, horrific medical experiments in the concentration camps. We kept returning to the idea that many physicians who helped create and participated in the horrors of the Holocaust fundamentally believed that they were doing the right thing, that theirs was a morally ironclad mission that couldn't be questioned.

The slippery slope argument informs much of the discussion around the medical treatment of suicidal patients. If one believes it is morally defensible to allow certain patients to commit suicide, what is to stop one from extending that argument to apply to all patients, or to extend it to the point where it is acceptable for physicians to administer a lethal overdose of morphine when the physician deems it appropriate? Analogous and equally thorny ethical questions have been debated with respect to other medical fields: palliative care, end-of-life care, physician-assisted suicide, euthanasia. Each has its own unique identifiers, especially with regard to how directly physicians are involved in the course of action that ends a person's life. The fundamental belief underlying these practices is that a patient's subjective experience of suffering can and should be acknowledged, that preservation of life itself shouldn't always be the ultimate goal. Yet among physicians and in the wider society, accepting and legalizing these practices is often perceived as the gateway to a slippery slope away from "do no harm."

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Joe was still in the hospital when I rotated off that inpatient service. I've wondered many times since then what ended up happening to him. In some ways, I'm hesitant to find out the answer. Whether it's because I don't want that information about a single case — a "single data point" — to sway me toward one medical argument or another, or because I

fear how I would react emotionally to learning his fate, or because of some mix of the two that I haven't yet put my finger on, something has always held me back from checking the medical records to find out.

My intuitively-driven stance that suicide could be a reasonable and morally defensible choice for some patients is far removed from what the medical establishment and our broader society define as being ethically sound. What I'm left with, after all my ruminations over suicidality and the ethics of treating it, is that "it depends on the patient," which, to me, is simultaneously the least helpful and the most reassuring way to bring these threads — my own moral intuition, our societal norms regarding what is ethical healthcare, and the nuance of taking care of each individual patient — together.

More broadly, what do I do with my beliefs when they diverge from the standard of care or from moral norms? How do I understand the limits of incorporating my personal views into clinical practice? I don't have satisfying answers to these questions yet. At a minimum, I want to continue to engage with my impulses and intuitions, because I believe that it is vital to continue to question accepted medical practice, while also remaining vigilant as to how my views on care could harm others.

For now, I don't know what I'll say, and I'm even less sure as to what I'll do, should I meet Joe again or another patient who has a similar story and should I be the one in the position to make the final call on whether to send home a suicidal patient.

# SEMINARY PAPERS



# Introduction to Selected Seminary Papers

BY THORIN TRITTER

EXECUTIVE DIRECTOR, FASPE

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In 2016, the FASPE Seminary faculty included Rabbi Jim Ponet, the Emeritus Howard M. Holtzmann Jewish Chaplain at Yale University, and Professor Kevin Spicer, C.S.C., the James J. Kenneally Distinguished Professor of History at Stonehill College. This thoughtful team led a diverse and wonderful group of 12 Seminary Fellows who were chosen from an international pool of close to 200 applicants and represented religious traditions that included Catholicism, Judaism, and several branches of Protestantism.

This caring group overcame religious differences to embrace each other, recognizing that many of the day-to-day ethical challenges they each will face as religious leaders were a common link that connected them. Confronted by a history of the Holocaust that includes few role models in Christian churches, our group faced the realization that religious leaders are not immune to ethical failings; and that silent complicity can have the same effect as active participation.

The selection of essays and sermons that follow explore some of the questions raised during the trip in further detail and from contemporary perspectives. They also represent the kind of deep-thinking and emotionally mature students who are attracted to the FASPE Seminary program.

The first paper is a sermon written by Daniel Headrick about the verses in Genesis in which God creates man in his own image. Drawing on his experience on the FASPE trip, Headrick highlights how frequently people fail to see God in the face of strangers, choosing instead to erase the image of God in those who are different. Headrick calls on us all to embrace the “other” and overcome divisions that can have disastrous effects.

The second is a paper written by Justin Mikulencak who describes two responses by clergy in pre-war Germany to the political situation at the time, which strike him as eerily similar to responses from the United Methodist Church to social and cultural changes taking place today. While readily admitting the significant differences in context, Mikulencak points to the failure of religious leaders to speak out and take action against injustice, both then and now; and to the tendency to retreat from action into theology.

The third piece is a sermon written by Misha Shulman, which begins with his somewhat counter-intuitive response to pause and praise God at one of the memorial sites that FASPE visited. Shulman then goes on to explore the ideology of “usefulness” that guided the Nazis, in contrast to the philosophies of religion that emphasize the value of all human

life and time itself, regardless of utility. Shulman concludes that rabbis and other religious leaders must not only stand up to injustice, but also remind people of the value of life for its own sake — as set against the relentless modern drive for progress and utility.

On behalf of FASPE, I thank the Seminary faculty and fellows for all they shared with me and each other, enriching the experience for everyone.

# Attempted Erasure

## A Sermon

BY DANIEL HEADRICK

BAYLOR UNIVERSITY GEORGE W. TRUETT THEOLOGICAL SEMINARY,  
CLASS OF 2017

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*Then God said, 'Let us make humankind in our image, according to our likeness; and let them have dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the wild animals of the earth, and over every creeping thing that creeps upon the earth.' So God created humankind in his image, in the image of God he created them; male and female he created them.<sup>1</sup>*

There is an image that is all too familiar to those who have ever studied the Holocaust. It is the gate at Auschwitz which bears this inscription in German: *Arbeit Macht Frei*. “Work makes you free.” The gate’s slogan was of course a vicious lie, the result of a culture of unmitigated hatred built on an endless stream of lies. There was only demonic work at Auschwitz, meant to dehumanize and to torture, meant to enslave and to kill. Most of the Jews and other victims of the Nazi’s genocidal rage who came to Auschwitz weren’t put to work at all. They were murdered, cremated, their ashes dumped in a pond at Auschwitz II-Birkenau. That is another image: the tranquil pond which lies some few hundred yards from the ruins of the crematoria at Auschwitz. If you had no historical awareness, and were just jogging by the pond, you would even find it beautiful. The pond is a graveyard.

I have been thinking a great deal about images since my trip to Auschwitz as part of a fellowship program of seminarians studying the Holocaust and contemporary ethics. I took over 3,000 photographs while I was on the trip. It’s an absurd number. I had this sense that people would want to know the fullness of the unreal terror I felt at being a witness to what happened at Auschwitz, albeit decades later. But the thing about an image is it is always an approximation of what is being depicted. It is an attempt to capture its subject, but it cannot capture the subject’s marvelous complexity.

We are a people awash in images, perhaps even overloaded with images, unlike at any other time in human history. Images flash before our eyes at a dizzying clip, and any

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<sup>1</sup> *The Holy Bible: New Revised Standard Version* (Nashville: Thomas Nelson Publishers, 1989), Genesis 1:26–27.

image is a mere keystroke away. Some of the images we see are manipulated to become absurdities, meant to evoke an ironic laugh or grin. Others are deadly serious, even terrifying. Those in the know traffic in internet memes, images which for reasons that are beyond our comprehension go “viral” and “burn” down the Internet.

We can all think of images that have momentarily captivated us and have even led to some social change, however small. The terrifying image of Aylan Kurdi, the Syrian toddler fleeing his homeland who drowned in the Aegean Sea, his tiny body curled up on the shore, the waves lapping at his face. People looked at that image. They became outraged. But nothing changed in Syria.

More recently, there was a photograph of a five-year-old boy, dazed and bloodied, sitting in an ambulance in Aleppo, Syria. He had been buried in rubble during a bombardment of the city. He too had a name, Omran Daqneesh. But his image, just like Aylan’s image, at first outraged us but then steadily faded from our memory. After this image was sent around the world, it was reported that Omran’s brother had been killed during that airstrike. Omran and his family are still trapped in Aleppo, and the United States has capped the number of Syrian refugees it will admit at 10,000 — a staggeringly low number. Despite the vast capacity and power of this land, the U.S., there is no *room* for the image of a suffering child who looks so very different from “us.” At least, this is the reality of our response to the suffering. We empathize and we may cry, momentarily, but then we move on. The image’s power is limited, it would seem.

There are other, rival images which seek to subvert the humanity of Aylan and Omran. During the elections, the Trump campaign disseminated a photograph of a bowl of Skittles on the Internet, suggesting that refugees could be reduced to a threat to the homeland. A bowl full of Skittles might include three pieces capable of killing us, the caption that went with the image ominously suggested. “That is our Syrian refugee *problem*” the caption concluded. While some people see the image of an innocent child when they look at someone like Oman, others see a threat to their carefully constructed order. But it is only when we see *through* a human being, instead of looking *at* and *with* a human being, that we miss the creation of the image of God in every person.

The image in the text before us is so much more profound and complex than the latest viral image. The text in Genesis claims that God created human beings in his image. And yet here we are in the 21<sup>st</sup> century, and the world appears to be tearing itself apart — we are part of a political moment in which truth and language has become so devalued that the commonalities which united so many humans are now contested and for many, utterly destroyed. So we struggle to understand what God meant when he created us in his image because the image we often see on television is a violent, bloody image — it is full of rage, and racism, and hatred of women and gays; it is a divisive image. Where is God in that image?



The author of the opening chapters of Genesis introduces the very words of God creating humanity on the sixth day of creation in this way: “Let us make humankind in our image, according to our likeness ...” No one really knows what God meant. An image, after all, is something we can see. It has a material reality to it. It can be apprehended with our eyes. People over the centuries have disagreed about what God meant. Some thought in rather physical terms: humans must contain some physical similarity to what God looks like. Does God have a face? Does he have two eyes? Does he walk about on two legs? Centuries before Christians confessed that God became flesh in the person of Jesus of Nazareth, the ancient Greeks recognized that religion is always prone to projection. We create the gods in our own image, not the other way around. A horse would depict the gods as looking like horses, and so on.

But Genesis insists that this tendency to project our image onto God has it all backwards. The text demands that we reverse our tendency to idolatry. Rather than imagine that God is just like us, the text says, God decides to make human beings in some unfathomable sense *like* God. It would have been nice if God had dropped a footnote into the text here, spelling out what exactly was meant by *image*. A tantalizing clue is given in Genesis chapter 9, when God makes a covenant with Noah and his family after the flood. God says: “Whoever sheds human blood, by humans shall their blood be shed; for in the image of God has God made mankind.”<sup>2</sup> Did you hear the reason why human blood is not to be shed? It is because humans were made “in the image of God.” When we assault a human being, we are also assaulting God. When we kill a human being, we kill that specific image of God that is contained within the human being we’ve killed. It is not to say that human beings *are* God — it is rather a poetic creation of fundamental value, dignity, and worth in the human predicated on God having created us.

That people would refuse to *see* the image of God in their neighbor seems inevitable, but that’s because we know how the story played out. As early as Genesis chapter 4, when Cain kills his brother Abel, we see how quickly human beings tried to stamp out the divine image. Cain could not see in his brother the image of the sovereign God who had made both of them. Or if he did see the image, he desired to erase it from the earth. But God’s image refused to be so erased, as God shows us when he tells Cain that Abel’s blood is crying out from the earth.

And humans persisted in their attempts to erase the image of God from their neighbor, and they are even at this very hour engaged in this fruitless and destructive project of attempted erasure. During my trip to Auschwitz, our group huddled together in room after room where unspeakable violence and terror were wrought on the minds and bodies of men, women, and children. There were piles of glasses, prayer shawls, a room full of nothing but pots, pans, cups, and other kitchenware, all testaments to the hope that the victims of the Holocaust held on to as they arrived at Auschwitz. Life perhaps would go on,

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<sup>2</sup> *The New International Version* (Grand Rapids, MI: Zondervan, 2011), Genesis 9:6.

they must have thought. There would be some semblance of the life they had before embarking on the train. But this hope was murdered, just as they were murdered.

We know that long before they were forced to get on trains, the project of rewinding creation, of erasing the image had already begun in earnest. The dehumanization began with the hysterical anti-Semitism in Germany and in Europe more generally, with the legal and cultural ostracism of Jews, with the physical deportation of human beings with names and dreams and hopes. It continued with human beings being forced into impossibly tight cattle cars without food or water for their demonic journey. And yet, the image persisted — it was written on the face of each woman, man, and child. The project of erasure continued when doctors who took the Hippocratic Oath decided who would live and who would die, separating humankind into lines leading to either death or something barely resembling life. For those who were not immediately murdered, their names were taken and in the place of a name a number was given, written upon their flesh. Their belongings were confiscated. Their hair was shaven. They were given a generic prison uniform to wear. All that had mattered and signified diversity and difference and love and creativity before they arrived at the death camps was now shattered in a few hours' time.

Approach Auschwitz from any angle, and you will see a factory of organized dehumanization. There was within the Nazi ideology a conviction that the victims of mass murder were not actually human. They were beneath humans, according to Nazi ideology. The image of God was replaced with the image of the Fuhrer, itself an arbitrary sign signifying nothing and built on crackpot race theories and nationalism. If you were not made in the image of the Fuhrer — that is, sufficiently Aryan and German — then you were not human at all.

So how do we retain the image the Nazis tried so hard to erase? How do we, drowning in a culture built on violence and hatred, retain the image? We may start with something as simple as learning the name of the “other.” On the side of a building in which people received disinfecting showers after arriving at Auschwitz-Birkenau, I saw that names were carved into bricks. On one brick is this name: Goldstein, Marta. Perhaps a second name — could it be a relative? — Kassa, is written underneath Marta's name. “BIRKENAU-July 25, 1944,” the inscription concludes. Here was a woman, we don't know who she was, but we know her name: Marta Goldstein. Undoubtedly, she was murdered here. But she inscribed her name on a brick in this awful place. I feel like she wanted to bear witness to the fact that she was *here, in this place*, and that she must be remembered.

And then, at the end of an exhibit at Birkenau, a wall of photographs appears. They were found after the war, taken from the murdered victims' belongings. I looked at the images. I tried to look at each person's face. For some, I imagined what their names might have been and what they may have been doing in the photograph. And now, they haunt my memories. I look at my photographs of these photographs, these images reflecting images, and I attempt to see the image of God in each person's face.

It is no easy task, to see in the stranger the image of God. The Nazis made it even harder through their own systematic project of dehumanization, step by step, so that the process of attempted erasure could be carried out more easily. No wonder they so often drunk themselves into a stupor or went insane, for when you erase the image of God in the other, the image of God within you undergoes torture and erasure too. We cannot penetrate into their minds. But we can see what they did at Auschwitz. Auschwitz, that terrifying project in rolling back creation. Jeremiah writes of something like this as he envisioned the terror of the Babylonian exile:

I looked at the earth,  
and it was formless and empty;  
and at the heavens,  
and their light was gone.  
I looked at the mountains,  
and they were quaking;  
all the hills were swaying.  
I looked, and there were no people;  
every bird in the sky had flown away.  
I looked, and the fruitful land was a desert;  
all its towns lay in ruins  
before the LORD, before his fierce anger.<sup>3</sup>

And yes, I looked at Auschwitz, and all of the carefully constructed methods I had for dealing with the problem of evil crumbled. They were formless and empty. I looked out the window of the prison barracks where people were huddled together in obscene conditions and I saw no light reflecting back; it was gone! I looked at the photographs of murdered Jewish children at Auschwitz, and there were no *alive* people anymore — human beings had been erased; burned!

There is a temptation to linger in the pit, in the abyss of pain that is and was Auschwitz. It too exerts a terrifying logic, an argument against our desire to see order in a world of disorder. “Here there is no God,” the Nazis might just as well have written on the portals instead of *Arbeit Macht Frei*. “Here, there is even no image of God.” There are just the gas chambers, and the ovens, and then nothing.

And yet, and yet, there is another story the Bible tells us, and we must go on telling ourselves and telling our children. It is this: God said on the sixth day of creation that he was going to create *all* of humanity in his image. And what God spoke, what God *did*, we humans cannot undo no matter how hard we try. For every attempted erasure of the image in our neighbor, we must inscribe their names on the bricks which house our deepest convictions. To simply *name* the other is already a step towards recognizing their

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<sup>3</sup> *The New International Version*, Jeremiah 4:23–26.

being made in God's image. Do you doubt me? Think of all the ways in which our society is divided by a refusal to learn the names of the other. They will forever be "the other" so long as we refuse to be in fellowship with them. Such a refusal is all around us. And so those who would erase the image of God in the other do not see in those that come across the border into the U.S., families with dreams and desires for food and prosperity and education — families with names and histories. No. They see only *illegal immigrants*. Those who would erase the image do not see men, women, and children fleeing endless terror and madness at the hands of so many forces — people with names and histories who seek refuge with us. No. They see only *Islamic terrorists* or *poisoned Skittles*. For every attempt to dehumanize the alien, the widow, the orphan, the refugee, the African-American victim of police violence, the Hispanic immigrant — for all of those attempted erasures — we must seek to reinscribe the image of God.

One day while visiting a museum during our trip to Germany, I was looking at some oil paintings with my friend Misha, another Fellow in the FASPE Seminary program. Misha was training to be a rabbi. We had decided to spend the afternoon together, laughing and talking and interpreting these beautiful paintings. Our talk turned to the deepest convictions we held. I spoke about my belief that God became flesh in Jesus Christ, and he spoke about his own powerful understanding of God through the lens of Judaism. We were standing close together, our faces inches away. I looked into his eyes, and he looked into mine. I asked him, "What do you think of me when you hear me talk about Jesus being God in this way?" I do not remember precisely what Misha said. At some deep level, it does not matter what he said anymore. What mattered is that in that moment when I looked into his eyes, and he into mine, when we put it all on the line and held nothing back, I saw the image of God staring back at me. The image was written on his face.

"So God created humankind in his image," we are told. I cannot stop dreaming about this, it would seem. To be made in God's image, I fear, means that we cannot confront the assault on the image just from our phones and computers. We must go out into the world, and we must stand with and by our neighbor, and we must give our neighbor refuge. And so whoever has become the "other" for you — for some it will be a Muslim, for some a person of color, for some an immigrant of any race or nationality, for others, a person who experiences same-sex attraction — can you imagine being in relationship with that "other"? Can you imagine a life in which that person is not simply a dehumanized category, but rather a wonderfully complex child of God? Can you even imagine standing so close to that person that you can look into their eyes, and they into yours? You just might be surprised at the image you see reflected back.

# Therefore, Go

## Reflections on FASPE, Injustice, and Ministry in Uncertain Times

BY JUSTIN MIKULENCAK

YALE DIVINITY SCHOOL, CLASS OF 2017

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I applied to FASPE in the midst of a deep uncertainty and insecurity that comes with pursuing ordination in a church that is tearing itself apart. The United Methodist Church is locked in a decades-long insular, theological struggle over same-sex marriage and the ordination of openly gay clergy. Recent significant shifts in the political landscape have entrenched the partisan ideologies of a failed leadership and intensified our inability or unwillingness to work together in the midst of difference. The opportunity to study the reaction of German clergy to the significant cultural shifts surrounding Adolf Hitler's rise to power seemed like an intriguing vantage point from which to grapple with my own questions and concerns with my church. While it would be absurd to draw conclusions that assume that Nazi Germany and the Holocaust are equivalent to conflicts in the United Methodist Church today, I found that the example of German clergy provided insight and lessons helpful to exploring my questions and doubts. This brief reflection will consider some of the broader issues German clergy faced and explore how, in that context, they chose to act. This link between broader dilemmas and individual decisions, in my mind, allows for a useful comparison between the vastly different circumstances of then and now without devolving into empty tropes or comparative suffering.

Before unpacking examples from the past and comparing them to my experiences with the modern church, I would like to say a few words about the act of comparison itself. Being at Auschwitz was like nothing I have ever seen or experienced. The pain and the weight of that place and its lingering presence in my life have tempted me to think of and portray Auschwitz as something unique and totally without comparison. But Auschwitz is not and should not be considered unique for (at least) two reasons. First, although the term genocide itself was crafted in response to the mass murder of European Jews, the concept inherent in the term, the "intent to destroy, in whole or in part, a national, ethnical, racial

or religious group,” can be observed across continents, peoples, and centuries.<sup>1</sup> To make Auschwitz totally unique is to dismiss the ways in which the drive to annihilate has shaped the course of human history. Second, and perhaps at the forefront of my current reflections, is that if what took place at Auschwitz was truly unique, then it would have little to offer us beyond statistics and nausea. It is not any facile or illusory uniqueness of Auschwitz that causes us existential uncertainty and pain, but rather the complex and visceral ability to transcend its and our own particularities. Put differently, I cannot hold what people did to one another at Auschwitz as unique because it was in that place that I recognized my own capacity to commit and contribute to terrible evil.

A final note on comparison that may be useful concerns the place of hope within comparative memory. There were, of course, those who resisted the rise of Hitler and the actions of the Nazi state through publications, sermons, protests, sheltering Jews and other undesirables, almost all of whom risked imprisonment and death. These stories of both small and great acts of resistance are familiar and beloved because they inspire hope in the goodness of people. While I believe that there is some degree of mythology inseparable from memory, those acts of resistance, both the historical and the invented, must not be confused with nor substituted for the whole of what happened. These bright spots and the hope they may inspire should not obscure the fact that many clergy were either supportive of or submissive to the Nazi regime and largely indifferent to the plight of the Jews. It is important that both the positive and negative have a place in our collective memory; but the moments of human goodness and hope might rather be thought of as stars in the night sky — only visible because of the vast darkness that surrounds them.

I want to focus on two specific responses by pre-war German clergy: their failure to speak out and take action against injustice, and their retreat into theology. In my interpretation, German Protestant and Catholic clergy responded to significant shifts under the Nazi state and guided their churches using one or both of these responses. While today’s context is quite different, these means of self-preservation, broadly defined, are still alive and well in our modern churches.

It is important to note that, historically, anti-Jewish policies and activity increased almost immediately after Hitler was appointed Chancellor of Germany in 1933. One of the early expressions of anti-Jewish sentiment were organized boycotts of Jewish businesses, the first beginning only two months into Hitler’s chancellorship. The economic effect of the boycotts was supplemented by a political and ideological climate that undoubtedly contributed to a broad intensification of anti-Jewish sentiment. The police barred the entrances to Jewish businesses. Widespread vandalism saw windows broken, stores

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<sup>1</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, *United Nations Treaty Series*, Vol. 78, No. 1021, [https://treaties.un.org/doc/publication/unts/volume 78/volume-78-i-1021-english.pdf](https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf). For an exploration of genocide as a modern term but a premodern concept, see Ben Kiernan, “Is ‘Genocide’ an Anachronistic Concept for the Study of Early Modern Mass Killing?” *History* 99 (2014): 530-48.

robbed, and merchandise destroyed. Everyday Germans took to the streets to intimidate Jews and contribute to a growing movement driven by “imagining a world without Jews.” Understandably, these early policies and events emboldened those who harbored anti-Jewish sentiments and spurred an increase in and the normalization of anti-Jewish discrimination and violence.

The German Protestant and Catholic Churches and their clergy generally reacted with silence, indifference, or even spite toward their Jewish neighbors. When some called on the Churches to interfere with the boycott of Jewish stores, the archbishop of Breslau, Cardinal Adolf Bertram, urged other German Bishops to stay silent, saying the boycott was “solely an economic matter” — an area of life in his view that was outside the bishops’ sphere of activity.<sup>2</sup> Bertram vindictively added in his letter, “The press that is predominantly in Jewish hands has been totally silent regarding the persecution of Catholics in various countries.”<sup>3</sup> Cardinal Michael von Faulhaber, the archbishop of Munich, wrote a letter after the initial boycotts to Vatican Secretary of State Cardinal Pacelli, stating that “It is, at this time, not possible to intervene because the struggle against the Jews would at the same time become a struggle against the Catholics, and because the Jews can help themselves, as the hasty breaking off of the boycott shows.”<sup>4</sup> Although these are but two examples, they demonstrate that Catholic leadership was aware of Jewish persecution and feared retribution if the Church were to speak out, as well as displayed observable indifference to the plight of the Jews.

A second response that I want to touch on was the temptation to take refuge in theology. As anti-Jewish acts worsened and the war began, both Catholic and Protestant clergy sought to use theology to justify their behavior, relinquish responsibility, and insulate themselves and their followers against the horrors of reality. Take, for example, the *Kirchenkampf* (church struggle) that occurred within the Protestant Church. The two prominent factions of the *Kirchenkampf* were the “German Christians,” generally portrayed as Nazis and Nazi sympathizers, and the “Confessing Church,” generally viewed as the noble resistance against Hitler. Yet, neither of these groups can be characterized so easily. The German Christians represented a fusion of Protestantism and German nationalism that saw the future of both the Protestant Church and the German nation bound up in Hitler’s vision of restoring the German people to a mythic former glory. The Confessing Church, on the other hand, strongly protested the Nazification and state control over the Church and its sacraments, as well as the notion that a Christian’s highest loyalty was owed to the state rather than to God. Many of these ideas were expressed in the famous Barmen Declaration, authored by renowned theologian Karl Barth. While these ideas did indeed represent resistance to Hitler’s attempt to bring the Church under his authority, perhaps it is too much of a leap to characterize this resistance as also a

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<sup>2</sup> Kevin P. Spicer, *Resisting the Third Reich: The Catholic Clergy in Hitler’s Berlin*, (DeKalb, IL: Northern Illinois University Press, 2004), 122.

<sup>3</sup> Spicer, 122.

<sup>4</sup> Spicer, 124.

resistance against and denunciation of Nazi policies of discrimination against Jews. While certain values of this theological resistance should not be uncritically diminished, the ideological and theological struggles of the Church provided a way to retreat in the face of suffering and injustice.

Similarly, the Catholic Church emphasized theological abstractions in the face of war and terror. As church-state relations deteriorated through a series of state power grabs, such as a redefinition of religion as based on blood and heritage rather than belief. (i.e. Jews that converted to Catholicism were still considered Jews by blood) or Hitler's *Concordat* agreement with the Vatican, German bishops issued a "joint-pastoral letter in which they reminded their clergy to limit their public complaints or rebuttals against the government to blatant anti-church attacks on Catholic 'dogmatic and moral teaching.'"<sup>5</sup> Further, if the clergy were going to refute Nazi ideology, they were to "fight against the false teaching and the lie, but never against the mistaken and lying person."<sup>6</sup>

Another instance of the retreat into theology is to be found in the behavior of Konrad von Preysing, the Bishop of Berlin. As the war dragged on and rumors of both an imminent German defeat and Nazi extermination camps spread, von Preysing increasingly used the language of suffering to frame his sermons and articulate his theological views. For von Preysing, the heart of Christianity was the suffering of Christ and, by extension, the suffering of his followers. Christians, according to von Preysing, should focus on and appeal to the mercy of God and celebrate the suffering and crucifixion of Christ. In 1944, near the end of the war, von Preysing called for all congregations to reconsecrate their congregations "to the sacred heart of Christ" as the proper response to the woes on the German home front, the faltering war effort, and rumors as to the fate of European Jews.

To be clear, these failures of Protestant and Catholic clergy should not be spoken of as if simple acts of speaking out against the injustices could have prevented massive death and destruction, nor should any condemnation import the luxuries afforded by modern hindsight and historical study. Rather, in addressing these failures so as to place them in comparison with modern issues, it becomes more important to state why something should have happened rather than simply what should have happened.

I recently heard a sermon titled "Are We There Yet?" The preacher recited a laundry list of everything that is wrong with the world, such as war; a massive and ongoing refugee crisis; economic, political, and racial inequality; escalating political partisanship; a ubiquitous media that makes violence, tension, and fear, increasingly present and accessible; rampant materialism that fosters selfishness and indifference; and the like. The preacher's point, of course, was that we are, in fact, not "there" yet. As the list went on and on, I found myself more and more annoyed at the idea that the Church, any church, could possibly make all

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<sup>5</sup> Spicer, 49.

<sup>6</sup> Spicer, 50.



of these things right. How are we supposed to get “there?” And while it is easy to preach about “there,” wherever and whatever that may be, I believe there is a fundamental difference between advocating for a vision of a world that has triumphed over injustice and being with those who suffer now. In this I see perhaps not an exhaustive answer, but rather some direction for exploring how modern clergy might approach systemic injustice. It is easy to say that German clergy should have spoken out against injustice; the pressing question is why we might believe this to be true. In my view, it is misguided to say German clergy speaking out against injustice would or might have prevented the horrors of the Holocaust. Ultimately, this is wishful, uncritical optimism that teaches us nothing. Rather, we can view the failure of the German clergy not as a failure to prevent all that happened, but as a failure to insist that Jews were fully human, suffering, and worthy of empathy.

In my view, the mission of the modern Church and the call upon modern clergy is not simply to advocate for a vision of justice or to operate within the acceptable and encouraged channels of advocacy and organizing. This essentially relegates our obligations and our duties to government services and non-profit organizations. The Church and its clergy are not called only to provide material and monetary resources. We are called to speak out against injustice and humanize through our presence. We are not called only to food drives that ship cans of food we don’t eat to people we don’t know, but to bring together those who have enough and those who do not. We are not called only to advocate for more resources for the homeless, but to be those resources for the homeless. We are not called only to demand moral institutions, but to be a moral institution. Rather than only point-out and denounce injustice, we the Church and we as clergy should intentionally seek out, know, love, and be present with those who suffer — because nameless, faceless justice might as well be known as a prolonged, more comfortable injustice.

My return from FASPE brought me back into the ongoing struggles of the United Methodist Church concerning same-sex marriage and openly gay clergy. Its General Conference, held only a few months prior, could easily have been described as a retreat into theology. I felt a deep disappointment and frustration as I watched the church that shaped me into who I am today descend into back-biting and underhanded political moves. Feeling defeated, I decided to skip church on a Sunday morning and run errands instead. Walking around the store with my wife, I paid attention to the other people walking up and down the aisles: a mother buying food for her family, a father never making it more than a few steps without a child running down an aisle or telling him to look at this or that, tired, bleary-eyed employees. It dawned on me that these people likely have no idea about my frustrations with church infighting over the election of an openly lesbian bishop, and most likely wouldn’t care if I told them. It struck me that my Church’s inability to work through differences and its byproducts were more similar to earlier examples of theological exposition that was not concerned with the suffering of others, and to theologians preaching suffering, and calls to consecrate parishes to the sacred heart of Jesus than I had initially thought. These actions are and were surely important to

particular communities, but in practice, they do not reflect the full range of possibility and reality. It seems to me that the cost of a modern retreat into theology via a relentless pursuit of some sort of facile, Pyrrhic theological purity is the failure to be present within and reflect the lives of everyday people. This is not to say that theological understanding is unimportant, but the pursuit of theological purity can be a form of abstraction that further removes the Church from the lives of people, especially those that suffer. While I can offer no set formula on how to use or implement theology across a church body, I think it is important that theology not become an academic abstraction, but that it be used, questioned, and continually reexamined to ensure that it remains sound enough to guide actions and flexible enough to accommodate both the messiness of life and the God that declares “I am making all things new.”<sup>7</sup> Theology must not be a retreat away from the world, but that which pushes clergy and the church into it.

Speaking out against injustice and retreating into theology are but two of my reflections on my FASPE experience as I contemplate graduating from seminary and pursuing ordination. Despite my frustrations, my questions, and my doubts, both prior to participating in FASPE and after my return, I remain committed to ordained ministry in the United Methodist Church. As a result of my experiences with FASPE, however, I will approach my ministry and vocation differently. I am convinced that the church must orient itself with a theology that pushes it into the world to speak out against injustice through its presence because I believe that the capacity to commit the terrible evils I saw at Auschwitz is in all of us, and begins with the tendency to be silent in the face of injustice, to be indifferent to the suffering of others, to dehumanize “the other.” These reflections have significantly shifted how I view my future, my personal faith, and myself as a person, and I am thankful for the opportunity to participate in FASPE and reflect on such important issues that will surely continue to engage me and help to shape my studies and my ministry in the years to come.

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<sup>7</sup> Revelation 21:5.

# Praising God on the Train Tracks

BY MISHA SHULMAN

INDEPENDENT RABBINICAL STUDENT, ORDINATION 2018

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While on a trip to Germany and Poland with FASPE this past June, I found myself praising God in the sweetness of the afternoon sun while standing on the Grunewald station train tracks from which Berlin Jews were sent to death camps during the Holocaust. The following is an attempt to understand that strangely positive moment in the midst of darkness.

It was our third stop at a Holocaust-related site on that long, heavy day. First we had been to the town of Brandenburg an der Havel, where some of the first gas chambers were built, and 10,000 mentally and physically challenged people were killed, along with a number of homosexuals and others deemed “feeble-minded.” Next, we had spent time at the House of the Wannsee Conference, where the details of the so-called “Final Solution” were ironed out. And finally, we visited the Grunewald train station, from which the Jews of Berlin were sent to be murdered. It was late afternoon when we got to the train tracks. The summer heat was intense and fatigue had set in. We walked down the tracks to the dozens of bronze plaques set into the platform, which recorded the transport dates, the number of Jews deported, and train destinations. As I walked, I felt myself pulled toward the magnetic force of the Israeli flags at the edge of the tracks, probably left by a group of recent Israeli visitors. Bright blue and white cutting through the grayness, draped proudly on the tracks, along with stones and dried out flowers. I touched the soft fabric with love, a love that I have not felt in a long time toward this symbol of nationalism, human shallowness, and greed. This symbol of the innocence of my childhood. This symbol of the state of Israel, which sends its children here to wrap themselves in this cloth and go back home to manage the cruelty over Palestinians with a gun. And yet, I needed to touch it. It felt cool and soft against my skin.

Soon I was joined by another Seminary Fellow, Emily, and one of the Seminary faculty, Rabbi Jim. So there we were by the flags, one rabbi and two rabbis in the making, and it was time for *Mincha*, the afternoon service. So far on our trip, we hadn’t prayed together. But that moment felt like the right time. We began with Psalm 145, the prayer that opens the *Mincha* service. *Ashrei yoshvei veitecha; Od yehalelucha selah*, we recited the first verse, “Happy are those who dwell in your house; they will forever praise you.” We sang our way through the entire psalm, an acrostic poem that praises God. Another rabbinical

student, Cornelia, joined us midway through, opening her prayer book. Others from our trip — priests, doctors, teachers, seminary and medical students — came and hovered nearby.

When we got to the line that begins with the Hebrew letter *koof*, Jim's voice rang out. Was it with sarcasm? I couldn't tell. "God is close to all who cry out to Him with truth." They did cry out to Him, with nothing other than truth. Each and every one of those who passed through the train station. Each of those murdered at Brandenburg. Each of those condemned to death by the Wannsee Conference, those who died and those who survived. Was God really close to them all? As close as a lamb sacrificed in the Temple was to the one to whom she was sacrificed? We kept singing through to the end: "And we will praise God from this moment through eternity, Hallelujah."

There were no tears in this prayer session, no strong emotions as far as I could tell. It was cleaner than all that. Which isn't to say that the thoughts behind the prayers made perfect sense. What's to praise in this God who let this happen? What's to praise here in this spot, on this day, and who exactly is it that we are praising? What is it that we were expressing in our joint praise?

As we walked out of the museum in Brandenburg an der Havel earlier that day I had found myself thinking back to a year-and-a-half ago and my nephew Nahar's bar mitzvah. Severely disabled, both physically and mentally, Nahar would have been a prime target for murder at Brandenburg. Unlike the parents of those first subjected to the Nazis' so-called "euthanasia" program, who wrote to Hitler asking him to kill their children in order to relieve their children's misery, as well as their own, my brother and sister-in-law have inspired everyone they know with their committed and loving care of Nahar. The bar mitzvah was a gorgeous and heart-breaking celebration of him and his life. It is unclear how long he will still live. It is unclear how much pain he lives with each day or how much his legally blind eyes can see. Nahar cannot speak or stand. To an outsider, understanding what he wants or needs seems like a guess, a type of projection onto him from his family and caretakers. And yet people who know him learn to read his signals, and love him and his unique way of being present. At the bar mitzvah, despite the near-certainty we all experienced that Nahar understood what was happening that day, and embracing, reveling and rejoicing in it, we also experienced moments in which we knew we might be wrong and that the strong sense of presence we got from him might be more projection than truth. That winter day we prayed a deep and joyful prayer together. We thanked God for Nahar and everything Nahar gives us. We thanked God for that immense, beautiful day, for that moment itself in which we stood together. It was an embrace of the beauty that exists within the frail, the unknowable, the fleeting. It affirmed life for life's sake, vibrantly awake even as it moves continually toward death, its value lying not in "progress" but in being, not in the future, but in the present.

Before we got on the bus to leave Brandenburg, I said to Cornelia, “They were wrong.” By which I meant that they, the Nazis, had made a mistake.

The Nazi view of life was diametrically opposed to that which was expressed at Nahar’s bar mitzvah. The Nazis valued utility above all else. Jews deserved to die, according to Nazi ideology, not just because the Nazis hated them, but because they hindered progress. There were plenty of people the Nazis disliked. That was not enough of a reason to kill them. Science had to support the killing. In the Nazi view, an Aryan alcoholic’s life was not worthy. Nazi leaflets depicted how one alcoholic would bequeath to the world over 70 delinquent offspring within a few decades. Society simply couldn’t handle the burden, the Nazis argued, and it would remain forever hindered in growth and progress by such individuals. In this way, the Nazis justified killing Aryan Germans who were living in mental institutions. They killed people like my nephew, people with schizophrenia, bipolar disorder, children who weren’t developing at the same pace as their peers, and many others with all sorts of mental and physical disabilities.

What I am suggesting is that their mistake was not only ideological, but spiritual. In essence, the Nazis made the same error that the 20<sup>th</sup>-century Jewish philosopher and theologian Abraham Joshua Heschel detected in the Hellenistic Jewish philosopher Philo. In an effort to put a rational twist on Judaism for the sake of keeping second-century Jews from abandoning their faith for the alluring Hellenistic culture around them, Philo suggested that observing the Sabbath had a utilitarian purpose: productivity. Resting, argued Philo, makes you a better worker during the week. In his seminal book, *The Sabbath*, Heschel rebelled against this notion by quoting the Zohar, a central Jewish mystical text: “The Sabbath is not for the sake of the weekdays; the weekdays are for the sake of the Sabbath.”<sup>1</sup> Shabbat — the day on which we can taste the nature of being, enjoy being with our loved ones, eat, drink, make love to our partners, and sleep well — is what we are alive for, not the vanities of our professional lives. The Nazis followed an opposing logic, which they believed would lead humanity to improve tremendously. If only those who hinder progress are eliminated, the logic went, then we would quickly reach a new age. The “Final Solution,” which we had brought to mind and discussed in our time at Wannsee before visiting the train tracks, was, to the Nazis, *chevley mashiach*, “the pangs of the coming of the Messiah.” In this sense, Nazism was not actually a secular movement, as it is often understood to be, but a religious, messianic one. Given this, it is entirely normal for them to have spliced the world into categories of us and them, and to have moved to eradicate the “them,” as other messianic movements have historically done.

Brandenburg, the place where Nazi mass murder began, suggests a category of “other” not defined in racial or religious terms, but in terms of usefulness. It leads one to wonder whether Nazi racial theory was a symptom of a deeper problem and not the driving force behind the killings. It forces us to look at today’s world and to not only look out for and

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<sup>1</sup>Abraham Joshua Heschel, *The Sabbath* (New York: Farrar Straus Giroux, 2005), 14.

fight racism, but to understand that behind racism may lie a deeper flaw: a rejection of the inherent value of living — and a notion that one person's life is useful to society, whereas another's is not. Healthy people should live, the sick should die. The weak should make way for the prosperity of the strong. A person who cannot or will not work for the advancement of society is sucking the blood out of the system. In the concentration camps, many were killed for their "laziness," usually meaning they were too sick to work.

The extermination program at Brandenburg as the precedent for the killing of the Jews presents the uncomfortable question of whether there was something in the Jewish spiritual system that the anti-Semites of the time sensed and hated, something about Judaism itself that made non-Jews uncomfortable. At Brandenburg I felt called to seek out what stood behind the racism, and I couldn't help but wonder whether the Nazis sensed something in our tradition that deeply challenged them.

Modern Hebrew slang has a beautiful expression: *Haval al hazman*, literally "too bad for the time," meaning "it's a waste of time." Over the years, this expression has been transformed to mean it's opposite. When Hebrew speakers use the phrase today, what they mean is, "It's amazing." The expression "waste of time" underscores that the experience you had was out of the ordinary. Time is not meant for accomplishing this or that in the world, or even for recounting that experience in words, but for enjoying, appreciating, for *being in it*.

On every special occasion, every holiday, and each time we do something we haven't done in a long time, Jews recite the words of the *Shehecheyanu* blessing: "Blessed are you, O God, Ruler of the Universe, for giving us life, and sustaining us, and bringing us to this moment." The concept of *hazman hazeh*, "this moment," has the power to transcend all else. This time or moment, and the ability to be in it and experience it, is an ultimate goal in Judaism. The Jewish notion of time poses a challenge to the Nazi ethic of utility.

In Brandenburg, I had had the same instinct as I did when seeing the Israeli flags at the Grunewald station. I wanted to touch the stones, the foundations of the buildings where the gas chambers had stood. I did touch them. They felt smooth and cool to the hand. The only question I asked our guide as we stood on the ground that once held the crematorium was also about touch: Who took the bodies from the gas chambers into the crematorium? I wasn't concerned so much with the perpetrators who assisted in the killing, but with the dead. Who touched their bodies once their souls were forced out? What, might I imagine, was the nature of that contact? My need to touch the place was so strong that I almost ran off the bus before we left, for one last touch.

Touch, physical pleasure, and sensuality are important in Judaism. Judaism does not believe in depriving the body. Rabbis are expected to marry and have sex. On Passover we are commanded to drink four glasses of wine. The morning service in Judaism involves highly sensual rituals: wrapping the arms and head in *tefillin*, or phylacteries, wrapping

the rest of the body in a *tallit*, or prayer shawl, singing the melodies of the verses of song called *Pesukei Dezimra*. Shabbat is an especially sensual day. Every Sabbath meal is a feast. Wine is drunk Friday evening, Saturday afternoon, and again on Saturday evening. The day ends with the *havdalah* service, a short series of blessings and rituals that speak to each of our senses: we taste wine, smell spices, feel the warmth of the candlelight on our hands, and listen to the sound of our own singing. The senses are crucial avenues through which to experience the divine. The fact that Shabbat, our “Temple in Time,” as Heschel called it, is celebrated through the senses, points to the deep connection in Judaism between pleasure and time.

I am trying to understand what gave rise in me to that powerful impulse to connect physically with the gas chambers in Brandenburg, to feel the pleasure of those cool stones and bricks. Perhaps I needed to feel the present, the current, solid world I live in, which isn't Nazi Germany, and in which a stone feels a certain way. Or maybe I wanted to touch something that is not an idea, a fact, a memory, or a story — things that can be manipulated and twisted, as we all do — but something that just is, even at a site of a former gas chamber. Or perhaps, after having just seen the photos in the Brandenburg museum of so many of the people whose lives were taken at that place, it's possible that I wanted to touch *them* in some way. Innocent people, including children, passed on at that spot. Perhaps I needed to touch that innocence, to touch them in their final moments of terror, in my sad, twisted and all so human imagination. Maybe I felt that in touching the place they were killed I could somehow transmit to them a sense of love.

In Brandenburg I did not think of praying, other than perhaps reciting the *Kaddish*, the Jewish prayer for the dead. There were too many emotions going around for that. By the time we got to praying, six or seven hours later by the flags on the train tracks, the emotions had been released, or distilled into an innocence that would present itself in the clarity of prayer. That innocence, which implies a moment in time, an ability to just be, a temporary reprieve from seeing darkness, a total belief in sweetness, a sense of joy and inseparable oneness, and a true moment of goodwill, that innocence was *haval al hazman*. It effortlessly made our prayer an antidote to everything we had witnessed that day and perhaps throughout the entire trip. It was a simple, manipulation-free refutation of the Nazi ethic of progress and utility, and a brief yet enduring testament to the lives of those who were killed in Brandenburg and sent to their deaths from those train tracks. It was pleasurable, and in experiencing that pleasure together at that site we reminded ourselves that pleasure exists, that it was good to experience it even there, and that part of our task is to seek pleasure and to protect each person's right to do the same.

Our recitation of the *Mincha* service, like Shabbat and most moments of prayer, was a pause. It was not “useful.” But our singing words of praise to the Eternal manufactured an important innocence distinct from the innocence of those killed, but perhaps carrying an echo of it, and distinct from the naive beauty of a child's sense of pride in his flag, but carrying the hopefulness that comes with it. The praise we offered together at that

moment carried within it a lesson we had learned on our trip as well as the seeds of the task that lay before us in returning to our communities back home.

What is that task? There is the obvious: stand up to bigots and racists and those who demean another's life; celebrate life and, for me as a Jew, celebrate Judaism. And then there is the less obvious: be a force for thoughtfulness and enjoyment, not ravenous progress; stand up to the forces that look at the world only through numbers, facts, grades, and other manifestations of "progress"; accept that the pace of personal progress is not the pace of New York City. As a religious leader, bring those pauses, built deeply into the fabric of our people and our faith, into the bustling world we live in. Use the Holocaust not as a tool for political manipulation, but as a way to be present to the frail reality of life, to the human tendency toward hate and death that must be continuously, laboriously negated; as an ever present *hineni* — "Here I am!" — that can keep us real, and keep us awake, and keep us in love. And in the midst of frailty and anger offer people an avenue to sing God's praises.







# Introduction to Selected Alumni Papers

BY THORIN TRITTER

EXECUTIVE DIRECTOR, FASPE

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With each passing year, FASPE's alumni network grows. With the addition of the 2016 Fellows, FASPE now counts nearly 400 professionals among its alumni, all of whom are sharing the lessons of FASPE through their own contacts.

FASPE actively works to sustain the discussions and connections made during each trip, through our annual Reunion & Symposium, regional events, and online discussions. Looking forward, we hope to increase these activities and actively promote the writing that our fellows are doing.

The two pieces that follow are just a small sample of the material being published on a regular basis by our alumni around the country on blogs, op-ed pages, in major newspapers and magazines, and in academic journals. These pieces hint at the resonance of the FASPE experience and the impact our alumni seek to have in the larger world.

The first piece included here is written by Kristen Bell, a 2013 FASPE Law Fellow who went on to serve as a Soros Justice Fellow and is now a Research Scholar in Law, Senior Liman Fellow in Residence, and Lecturer in Law at Yale Law School. Bell's piece describes a Holocaust survivor's presentation that Bell organized as part of her work with California prisoners serving juvenile life sentences. As Bell makes clear, the power of the survivor's testimony reached across the cultural divide to provide hope to the prison inmates in the audience and spurred in them a desire to be better people.

The second piece is written by Eric Martin, a 2015 FASPE Seminary Fellow who is a doctoral candidate in systematic theology at Fordham University and co-editor of *The Berrigan Letters*, which was published last year by Orbis Books. Martin writes about his own decision to join the recent protests over the Dakota Access Pipeline and how the events there shaped his concerns about the future. While he backs away from an aggressive call to action, Martin does speak to the value of civil disobedience and asks the reader to consider how he or she may be benefiting from systemic injustice.

I am grateful to these two authors for sharing their work with FASPE and to all our alumni for their dedication to their professions.



# “You Showed Us What Hope Looked Like”

BY KRISTEN BELL

FASPE LAW FELLOW 2013

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Hope is a scarce commodity behind bars. Just ask the men in the maximum-security yard of the California State Prison at Lancaster. You’ll hear story after story of how a loss of hope can lead to bad actions and a feeling that nothing matters — a feeling that can breed tragic consequences for those unable to overcome it.

But a group of those incarcerated at Lancaster seeking to rekindle hope recently got a powerful boost from a most unlikely messenger: a 92-year-old named William Harvey

who endured the concentration camps at Auschwitz and Buchenwald to become perhaps the first Holocaust survivor ever to give testimony at an American prison.

Harvey regularly speaks at the Museum of Tolerance about his experience in the Nazi concentration camps when he was 19 years old, and of later immigrating to America to begin a new life. But this summer, Harvey decided to share his story with a collection of 25 men serving life sentences at Lancaster for convictions at ages 15, 16, or 17.

They are a diverse group, today ranging in age from 22 to 52; speaking English, Spanish, and Vietnamese; working as kitchen aids, porters, and clerks. What unites them is a desire to create solidarity around rehabilitation and hope for release, reflected in the name of the group they've formed, Youth Offenders United 'N Growth (YOUNG).

The event opened the same way that all meetings of the YOUNG group open: with a poem about hope. It was one of Mr. Harvey's favorite poems — *A Creed*, by Edwin Markham — whose words he has lived by ever since he immigrated to California after World War II and a teacher asked him to memorize it:

There is a destiny that makes us brothers:  
None goes his way alone:  
All that we send into the lives of others  
Comes back into our own.

I care not what his temples or his creeds,  
One thing holds firm and fast  
That into his fateful heap of days and deeds  
The soul of man is cast.

In the audience that day, the YOUNG group was joined by 25 other prisoners, as well as Warden Debbie Asuncion, assorted correctional officers, and other prison staff. They listened as Mr. Harvey described his life as a Jewish child in Berehova, Czechoslovakia, and the fear he felt when Hitler declared on the radio that every Jew must die. They heard him describe how, at age 19, Nazi soldiers ordered him to leave his home and forced him and his mother and sisters into an overcrowded ghetto without adequate food, heat, or sanitary conditions.

You could hear a pin drop as Harvey went on to describe how soldiers then forced him and hundreds of others into cattle cars and took them to the death camp at Birkenau. His mother was sent in a line to be killed in a gas chamber, while he was taken to work in the concentration camp at Auschwitz, and then taken to Buchenwald.

After a forced march in the winter of 1945, he was frozen, presumed dead, and taken to the crematorium. A prisoner working there realized he was still alive and transferred him to the infirmary. He weighed 72 pounds. The camp at Buchenwald was liberated by American troops on April 11, 1945.

Blessed with his newfound freedom, Harvey immigrated to New York in 1946, and then to Los Angeles where he got his high school diploma. He became a cosmetologist, opened his own salon where he catered to stars like Judy Garland, and married his wife June Gardiner, who died of cancer in 1995. It was impossible not to see the genuine love and pride in Mr. Harvey's eyes when he talked about his wife, two children, and four grandchildren.

The audience was riveted, and, at the end of his talk, asked how he was able to move beyond the horror and live such a rich life. Love and hope, he replied, are the most important things we have as human beings. When asked if he has forgiven the Nazis, he said he feels no anger towards them. "I feel bad for them because they were full of hatred," he said. "Hatred is the loss of love, and to live without love is not living at all."

Following the talk, Alex, one of the members of the YOUNG group, wrote a letter expressing his gratitude. "Thank you for coming to visit us and share your story. I feel such honor to have shared this space and moment in time," Alex wrote. "I shook the hand of history, of survival, of love, of inspiration, and came away with a spark of purpose."

Kevin, another member of YOUNG, wrote a letter on behalf of the group as a whole. "We thank you because you showed us what hope looks like," wrote Kevin. "Hearing your story and knowing anyone can succeed as long as they don't give up on HOPE, gives us the strength and desire to change — to become a better person, to be our true selves."

That spark of purpose caught fire. After the event, the men in the YOUNG group decided to conduct a fundraiser at the prison to raise money for A Place Called Home, a nonprofit organization that helps at-risk kids in South Central Los Angeles. "I wanted to give back to the community that I helped destroy," said one group member. Added another: "It felt damn good. I felt like I was on the top of Mt. Everest," describing the sensation as "empowering."

Some are preparing to attend parole hearings at which youth offender cases involving crimes committed before the age of 23 are reviewed — and support the consideration of youth as a mitigating factor. And other members were focusing on how to take advantage of changes in California's criminal justice laws, such as Prop 57, which will offer new chances for the incarcerated to be paroled and require a judge's approval for juveniles to be tried as adults.

It seems Mr. Harvey, and the members of YOUNG, have found a way to grow hope in the most unforgiving terrain. May it be an inspiration to us all.

*Kristen Bell helped the founding members of YOUNG start the group and continues to volunteer to help the group grow.*

[Note: This piece was originally published by the Open Society Foundations on January 12, 2017 and can be found at <https://www.opensocietyfoundations.org/voices/you-showed-us-what-hope-looked.>]



# At Standing Rock and Beyond, What Is to Be Done?

BY ERIC MARTIN

FASPE SEMINARY FELLOW 2015

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Credit: Stephanie Keith/Reuters

Near Cannon Ball, N.D. — “We love you!” yelled someone from our line, linked arm in arm.

We were facing Dakota Access Pipeline workers threatening us with baseball bats and wrenches, one of whom had only moments ago sped his large truck through our ranks. They had called us “the scum of the earth,” and replied to our assurance that we were nonviolent by warning, “We’re not.” A helicopter had appeared and begun circling low

over our heads. And from this scene, one of the men who had not yet spoken sheepishly replied, “We love you, too.”

We eventually parted ways, not in peace, but at least not in physical violence. We had distracted them from further construction of the project that threatened to spill oil in the Lakota water supply and headed back to our cars to take part in a march through the streets of Bismarck, North Dakota. But amid all the movement, that moment stayed with me.

I had come with a group of Catholic Workers for reasons anyone studying or teaching theology as I do might find obvious. The violation of basic dignity happening here defies the consistent refrain by the prophets and Jesus to do justice with an eye toward the exploited. We had been told white bodies could help by surrounding native ones, shielding them while they sought to protect their water.

The anxiety about immigrants’ diluting “American culture” that helped usher Donald J. Trump to victory has caused many Americans to forget that “American culture” itself began as an intrusion from foreign lands; Lakota people at Standing Rock also have a historically well-established reason to fear this culture. The Lakota are reminding those who will listen that this land’s original immigration problem was of European origin and it continues to threaten their lives and livelihood after half a millennium of a genocidal onslaught. Its most recent manifestation is this pipeline.

I have meditated on that profession of love several days ago from a grown man wielding a bat to threaten us. It called to mind a conversation with my theology students at Fordham about Henry David Thoreau’s essay “On the Duty of Civil Disobedience,” in which he argues that “all machines have their friction,” but that “when the friction comes to have its machine, and oppression and robbery are organized, I say, let us not have such a machine any longer.” He had in mind the evils of slavery and the American government’s theft of half of Mexico in the Mexican-American War, but it spoke fittingly to this older form of oppression and robbery the Lakota people still suffer, in which even those who love them will still oppose them with a weapon and disrupt their sacred grounds.

After our class argued over how we might know when these frictions came to possess the machinery of government, one student declared emphatically that if we could not already recognize that the friction had taken over, then we would never see it.

It was hard to disagree, especially the day after our encounter with the pipeline workers when the police pepper sprayed a Lakota prayer service and those of us surrounding it, arresting whom they could. What kind of machine produces violence to meet prayer, and prison in return for demanding resources to simply live? What kind of machine responds to those trying to protect their water by spraying them in subfreezing temperatures with

*water*? Is it a machine overtaken with friction, or is the nexus of power between corporations and government that is trying to trample over the Lakota once again simply an unfortunate byproduct of an otherwise benevolent and worthy machine? How much oppression and theft is tolerable in order to keep the machine running? Where is our breaking point, at which we say that the benefits do not outweigh the human cost?

Thoreau's claim was that citizens needed to become a "counter-friction" against injustice, that all people had a duty to disobey immoral laws and orders. The idea directly influenced Gandhi and the Rev. Dr. Martin Luther King Jr., who added their own positive notions to resistance. Gandhi insisted that more than *ahimsa* (the Sanskrit word for causing no harm) was needed in the Indian independence movement. *Satyagraha*, or "the force of truth," had to be embodied as well. Dr. King invoked the Christian demand to love one's enemies in the civil rights movement, summoning the Greek notion of *agape*, a form of universal love, to channel God's love for racists in power like Bull Connor. In both cases, this notion of being a counter-friction was fundamental, as was Thoreau's insistence that it was one's duty.

We ought to ask ourselves whether Thoreau was right. What line in Standing Rock would have to be crossed to demand our resistance that had not been passed over long ago? Do we wait until the Missouri River flows with oil? Would we need the police to begin shooting the water protectors with metal bullets instead of rubber ones? At what point does Thoreau's duty kick in? When white people rather than native tribes bear the brunt of oppression?

Another question arises: how to disobey? Must we hold allegiance to *satyagraha* and *agape*, or was Malcolm X right to assert that Dr. King's insistence on love was just another layer of white colonization that put hypocritical conditions on how minorities might protest? Actions led by the Lakota people were disciplined in something like this concept of *agape*, reminding those on the front lines that we are to love these police officers and issuing prayers over the loudspeaker for their own children's water supply. But some white allies who had joined their struggle, quite understandably, held no love for those who might mace them mid-prayer without warning. There was no clear consensus on the parameters for civil disobedience.

Of course, it is not for others to dictate to the Lakota how to protect their water. But Thoreau's claim must be grappled with for those who reap the benefits of systemic injustice and exploitation, as he did. Donald Trump's tenure as president-elect immediately began with protests, some more peaceful than others. As more people embrace the need to say "no" in some capacity, whether in North Dakota or beyond, the issue of how to do so and what is worth preserving has become pressing.

Daniel Berrigan, the poet and priest who died in April, and whose actions throughout his life pushed the limits of civil disobedience, posed the issue in language that closely echoed that of Thoreau and bears relevance today: “Someone, as a strict requirement of sanity and logic, must be willing to say a simple thing: ‘The machine is working badly.’ And if the law of the machine, a law of military and economic profit, enacted by generals and tycoons, must be broken in favor of the needs of man, let the law be broken. Let the machine be turned around, taken apart, built over again.”

I still churn that moment over in my mind: A man threatening us with a baseball bat told us he loved us. Despite the presence of *agape*, love between people who had never even met before, we had already organized ourselves in a violent way that ruptured any chance for human community. It seems clear that the moment for resistance had come too late, that something was allowed to flourish that never should have had the chance to sprout. Lines were drawn centuries ago, were never erased, and we had simply stepped into ready-made roles. We loved one another, but a system was in place encouraging hatred, and we could only navigate it awkwardly and poorly.

It’s worth communal consideration whether this machine is worth maintaining. The ascension of the country’s next president demands it. But the question of whether we have a duty to be a counter-friction was answered a long time ago, and the situation at Standing Rock is merely a reminder that far too many of us are still refusing to answer it.

*Eric Martin is a doctoral candidate in systematic theology at Fordham University and co-editor of The Berrigan Letters.*

[Note: This piece was initially published in *The New York Times* on November 25, 2016. It can be found at [https://www.nytimes.com/2016/11/25/opinion/at-standing-rock-and-beyond-what-is-to-be-done.html?\\_r=0](https://www.nytimes.com/2016/11/25/opinion/at-standing-rock-and-beyond-what-is-to-be-done.html?_r=0).]







